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REPORTS
OF
CASES DECIDED
IN THE
HIGH COURT OF CHANCERY
OF
MARYLAND.

BY THEODORICK BLAND,
CHANCELLOR.

VOL. II.

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CASES DECIDED
IN THE
HIGH COURT OF CHANCERY
OF MARYLAND.

CRAPSTER *v.* GRIFFITH.

AN infant female between sixteen and twenty-one years of age, is competent to give a valid receipt for her property, but not an acknowledgment for the payment of an equivalent. The auditor may be ordered to proceed immediately to the adjustment of an account—a settlement in the Orphans Court by a guardian is not conclusive; but when relied on by him here, he should produce the vouchers on which it was founded. A party may be arrested under an attachment any where, out of, as well as in the county of his residence. A plaintiff, after a decree in his favour for the delivery of certain negroes, may, by a new bill, recover their increase and profits subsequent to the auditor's report, and not included in that decree. A decree of the Court of Appeals, sent to the Court of Chancery to be executed, cannot be there revised or modified in any material particular. Personal property, of which a partition cannot be made, may be sold, and the proceeds of sale divided.

THIS bill was filed on the 20th of September, 1809, by *Bazil Crapster* and *Harriet* his wife, against *Lyde Griffith*—It states, that *Vachel Dorsey* died in the year 1795, leaving a widow *Ann*, and two children *John H. Dorsey*, and the plaintiff *Harriet*; that the intestate died seized and possessed of a considerable real and personal estate; that letters of administration, on his personal estate, were granted to his widow and *Luke Pool*, but that all the assets, and the actual conduct of the administration, passed into the hands, and was performed by the widow; that, some time early in the year 1798, she married the defendant, after which, on the 25th of April in the same year, they settled a final account with the Orphans Court, shewing a balance of £503 11s. 3¼d. due to the estate; that *John H. Dorsey*, the son of the intestate, died some time in the year 1798, under age and intestate; after which *Luke Pool* died, leaving the then wife of the defendant as the surviving administratrix, that the defendant, soon after his marriage

with *Ann*, was appointed, by the Orphans Court, guardian of the plaintiff *Harriet*, and took possession of her real and personal estate accordingly; that *Ann* died, some time in the year 1807, leaving the whole surplus, and all the personal estate of her intestate, which remained in specie, in the hands of her husband the defendant; that the defendant, after the plaintiff *Harriet* attained the age of sixteen, under an assurance, that she was only entitled to a portion of her father's and brother's estate, in money, according to the inventory, rendered to her an account shewing a balance of only about £230; and obtained from her a release; which account was erroneous; and the release was obtained from her unduly and improperly; the consideration therein expressed never having been paid or satisfied; that the personal estate of the intestate consisted of negroes, stock, and other specifics, which were returned in the inventory at a very low valuation; and all which by offspring or otherwise, greatly increased in value; and that the plaintiff *Harriet*, during a great part of her minority, lived with her grandmother, and was not maintained or educated by the defendant. Whereupon the bill prayed, that the defendant might be decreed to deliver up the full share of her father's and brother's personal estate; and to account for the rents and profits of her real and personal estate, &c.

The defendant put in an answer to this bill, in which he admits the death of the intestate; the administration on his estate; and his own marriage with the widow as set forth; but he avers, that the inventory returned included articles of personal property, which did not, in truth, belong to the intestate; and that all the articles were correctly valued; that, on the 12th of December, 1798, he was appointed guardian of the two children of the intestate, *John H. Dorsey*, and the plaintiff *Harriet*; that after the death of *John H. Dorsey* he administered upon his estate, and settled a final account on the 10th of August, 1802; that he had a valuation of his ward's estate made according to law: This defendant admits, that the administrators of the intestate settled a final account, as set forth; but he denies, that any part of the amount ever came to his hands; that *Ann*, the wife of this defendant, died on the 9th of January, 1808; and he passed a final guardian's account with the Orphans Court, whereby a balance of £239 18s. 4¼d. was shewn to be due to the plaintiff *Harriet*; that about the 1st of February, 1809, a settlement took place between him and her, in the presence of her uncle and grandfather; when she agreed, that

in lieu of receiving her proportion of the negroes and stock, she would consent to receive from him nine and three-quarters acres of land, one negro girl, some articles of household furniture, and \$389 75; which she accordingly did receive.—Whereupon, she willingly, and of her own accord, gave the release mentioned in the bill; which was not unduly and improperly obtained from her. That the plaintiff *Harriet*, before her marriage, agreed that the defendant should continue to hold her land for two years, on paying an annual rent therefor. That when the defendant married the widow *Ann*, the property was much out of repair; that he has considerably enhanced the value thereof, by erecting an addition to the dwelling-house; by building a barn; and by improving the property; for which, he conceives he is entitled to an allowance; that, at the death of the intestate, there were eight negroes, two of whom died since the appraisement; and that there has been an increase of five, born since that time.

The plaintiff put in a general replication to this answer, and a commission was issued, and testimony taken and returned. After which, the case was brought on for hearing.

16th May, 1811.—KILTY, *Chancellor*.—This case was submitted on notes filed by the counsel on each side, which, with the bill, answer, and proceedings, have been considered.

The Chancellor is of opinion, that the complainants are entitled to relief; and, that the release set up by the defendant ought to be set aside, on account of the time and manner in which it was obtained; and also, on account of its not being a mere receipt for her part of the estate, but an acknowledgment of an equivalent, as she then considered it, for what she was entitled to, which, if leading to her injury, ought not to be countenanced by a Court of Equity. (a)

With respect to the manner of taking the account, it is not meant to decide thereon at present; but the Chancellor is of opinion, that so far as the specific property came to the hands of the defendant as guardian, having before held it by his intermarriage with the administratrix, he is not entitled to settle by the amount of the inventory in money. But, on the other hand, the Chancellor is not satisfied, that the appraised value of the negroes, &c. (as far as it is to be considered in the account,) is to be controverted by the opinions of witnesses as examined in the commission.

DECREED, that the release signed and sealed by the complainant *Harriet*, filed with the proceedings, exhibit No. 6, be set aside, annulled, and declared void as such, leaving the money and articles therein referred to, to be restored or accounted for as shall hereafter be ordered. And that the defendant account with the complainants for their proportion of the personal estate, and for the rents and profits of the real estate in the proceedings mentioned. That the said accounts be stated by the auditor according to the proof already taken, and in addition thereto, on such proof as may be produced by either party; and to be returned, subject to the further order and decree of this court.

The plaintiffs, by their petition, stated that they had frequently applied to the auditor to state an account, as directed by this decree, which he had not done, by which means the defendant was left in the full enjoyment of all their property, to their great delay and injury. Wherefore, they prayed, that the auditor might be ordered to proceed without delay, &c.

5th June, 1812.—KILTY, *Chancellor*.—The auditor is directed to proceed immediately on the statement of the accounts under the decree; unless prevented by any particular circumstances, which circumstances, if any, he will state to the court.

After which, the auditor stated, and on the 2d of July, 1812, reported an account, as required by the decree; which was suffered to remain some time without objection, when the case was again brought before the court by the plaintiffs.

15th July, 1812.—KILTY, *Chancellor*.—The report having been docketed, and laid during the first seven days of the present term, the complainants are entitled, under the rule of the court, to have the accounts ratified, or examined and decided on.

DECREED, on the application of the complainants, that the account reported by the auditor, and filed, as above mentioned, on the 2d day of July, 1812, be ratified and confirmed; and, that the defendant *Lyde Griffith*, do forthwith pay to the complainants, or bring into this court to be paid to them, the sum of £363 2s. 1d. current money, with interest thereon from the 2d day of July, 1812, till paid or brought in; and the costs of this suit amounting as taxed by the register to —.

After which it was, by a writing filed, agreed between the parties, that this decree be annulled and set aside; that the accounts and papers be returned to the auditor; and that further accounts be stated according to the directions which should be given to him by either party.

On the 19th of December, 1813, the auditor filed a report in which he says; that instructions having been filed, on the part of the complainants; and the service of notice, when he should proceed to state the account having been admitted by the defendant; he did proceed accordingly, and having carefully and minutely examined the proceedings, the testimony and the instructions, he has first stated account No. 1, in which the defendant is charged with the rents and profits of the real estate, without interest, up to the 9th of January, 1811, and credited by his wife's one-third thereof to the 9th of January, 1808, the day of her death. This account shews the sum of \$201 26, to have been *John H. Dorsey's* share of the said rents and profits to the day of his death; and the sum of \$1322 63, to have been the complainant's wife's share of the same rents and profits, to the day on, or about which the possession of the real estate is said to have been delivered to the complainants.

The auditor has then stated account No. 2, in which the defendant is first charged with the whole balance of the personal estate remaining, after payment of debts, with interest thereon from the 25th of April, 1798, to the 19th of December, 1813, and credited by the amount of the appraised valuation of the slaves; by his wife's one-third of the balance, to the day of *John H. Dorsey's* death, and her one-half thereof from that time to the 19th of December, aforesaid. This part of the account shews the sum of \$194 32, to be *John H. Dorsey's* proportion of the net personal estate, other than slaves; and of the interest of the whole net personal estate to the day of his death; it also shews the sum of \$738 16, to be the complainant's wife's share thereof to the said 19th of December, 1813. In the second part of this account the defendant is charged with *John H. Dorsey's* said proportion of the profits of the real estate; and with his said proportion also of the net personal estate, other than the slaves, and of the interest of the whole net personal estate, to the day of his death; and he is credited by the usual allowance for the said *John H. Dorsey's* board, clothing and tuition, viz: the yearly profits and interest of his real and personal estate respectively; and, also by his wife's one-half

of the balance. This part of the account shews the sum of \$68 25, to be the complainant's wife's share of her deceased brother's net personal estate, other than slaves as aforesaid.

The auditor has then stated account No. 3, in which the defendant is charged with the complainant's wife's share of her deceased brother's net personal estate, other than slaves; with her said proportion of the rents and profits of the real estate; with her said proportion of the net personal estate, other than slaves, and of the interest of the whole net personal estate to the 19th of December, aforesaid; and lastly, with interest on the two last year's rent of the real estate, from the day and year respectively, on which they became due to the 19th of December, 1813. He is then credited by the usual allowance as aforesaid, for the board, clothing and tuition of the complainant's wife, and by the negro girl, cash, and sundry articles stated to have been paid to her, by the defendant, as the consideration of the release vacated by the decree. The defendant, however, is not credited by the land, said to have been at the same time, and for the same purpose given to the complainant's wife at \$100; because it does not appear from the proceedings, that the said land, or any other was ever conveyed to her. This account then shows a balance due on the 19th of December, 1813, to the complainants of \$41 88.

The auditor has then stated account No. 4, first stating from the testimony, taken in virtue of the commission, an estimate, marked A, of the value, at the time of executing the said commission, of the personal estate which consisted of slaves, together with their increase, in which the defendant is charged with all the slaves, and credited by one-half of them in value in kind in right of his deceased wife. This last account gives seven negro slaves therein named, most of them children, to the complainants, and four of full age to the defendant.

The auditor begs leave to remark, that if the improvements for which the defendant claims an allowance have given any additional value to the real estate, which from the testimony is extremely doubtful, he is of opinion, that their cost as well as every other incidental expense, not allowed him in the accounts aforesaid, have been fully reimbursed by his holding the net personal estate, other than the slaves, at their appraised valuation, which is clearly proved to have been a very inadequate one. He has to remark, also, with reference to the interlocutory decree, that if the accounts had been stated conformably to the principles there suggested, the

result would have been precisely the same. He therefore begs leave to report, that the complainants are now entitled to the following negro slaves, to wit: *Ben, Joseph, Roderick, Lucy, Westly, Mary, and Henry*, and also to the sum of \$41 88, with interest thereon from the 19th day of the current month until paid; and their costs incurred in the prosecution of this suit.

To this report the defendant excepted; *first*, because the auditor had paid no regard to the valuation of the real estate, as made under the authority of the Orphans Court, and sanctioned by that court, and which valuation could not be set aside by the testimony in this case; *second*, because a sufficient allowance had not been made for the board, clothing, and education of the complainant *Harriet* and her brother; *third*, because the defendant was charged with the rents and profits of the real estate before he took charge thereof, or had any thing to do therewith; *fourth*, because no allowance was made to the defendant for the repairs and improvements made by him on the farm of the complainant *Harriet*, and which being necessary ought to be allowed; *fifth*, because sundry credits, to which from the testimony, it appeared that the defendant was entitled, had not been allowed to him; *sixth*, because the negro girl, received by the complainant *Harriet* of the defendant, was credited at too low a sum; and, if the settlement was to be set aside, the complainant could have no right to said girl; *seventh*, because the rents and profits of the complainant *Harriet*, were fixed at an extravagant price; and were charged to the defendant when they were not received by him.

18th January, 1814.—KILTY, Chancellor.—The exceptions to the auditor's report being submitted on notes in writing, the proceedings in the suit have been considered; but the Chancellor has not fully made up his opinion on them.

On the first exception he is not satisfied, that the valuation recognized by the Orphans Court ought to be disregarded, and the value estimated from the evidence; but if this valuation should be taken as the rule, it may not apply to every year. On the third exception, the Chancellor is under the impression, that the defendant is answerable as far as a claim against his wife, who might have been obliged to account; provided any sum should appear to have been due before his guardianship commenced. It cannot be admitted, that settlements made by the Orphans Courts are in all cases conclusive; but they may frequently render it necessary to bring further proof of credits allowed by them. But when the balance

stated against a guardian on a final account is relied on by him, he ought to exhibit all the accounts, so as to shew the original charges on which it was founded.

The Chancellor is satisfied as he was on passing the decree to account, that the complainants were entitled to a distribution of the specific articles when they could be traced in the hands of the administrator or guardian. But he cannot confirm the account No. 4, reported by the auditor, in which he makes the allotment to the parties of different negroes by name. There are two modes by which this may be done in the Orphans Court. One under the act of 1798, ch. 101, sub ch. 11, sec. 16, by making the distribution on a day appointed: and the other under the act of 1810, ch. 34, sec. 5, by the appraisement of commissioners, on which, if necessary, a sale may be ordered. The last act is not obligatory on the Orphans Court; but they may resort to the former, which in this case is considered preferable. And if this court has any jurisdiction or power in the case, it may adopt the modes prescribed for the Orphans Courts, or a course analogous to them.

It is therefore *Ordered*, that this court will on Thursday, the 3d day of February next, make a distribution of the negroes mentioned in the proceedings, and in the auditor's account No. 4; provided a copy of this order be served on the defendant *Lyde Griffith*, before the 26th day of the present month. The Chancellor will also, on that day, determine as to the other parts of the report, and decree accordingly. It is however to be observed, that the counsel for the defendant, relying possibly on the defence set up, has not given to the auditor instructions to state an account in any other manner, or shewn how the balance would stand, after excepting the negroes as specific articles, if his exceptions should prevail.

After which, the parties having had time to consider and prepare for the further argument of the case, on the suggestions of the Chancellor, they put in some further notes in writing of the arguments on which they respectively relied, and the case was again brought before the court.

12th February, 1814.—KILTY, Chancellor.—The Chancellor has again examined the proceedings in this case, and considered the additional notes put in for the defendant and since for the complainant.

The most material point in controversy is, that respecting the settlement in money, or in specific articles, as to which the Chancellor has already expressed his opinion, which is not altered. The objection to the credit of \$150, on account of the negro girl, appears to be reasonable, inasmuch as the complainants, on setting aside the settlement or receipt No. 6, ought not to retain any benefit arising from it. The negro girl ought, therefore, to be returned, as also the land, which, not being conveyed, the auditor did not bring into the account. This will render necessary an alteration in the account No. 3, which is made in an account stated by the Chancellor marked No. 5, leaving the balance in money \$235 83, instead of \$41 88. The Chancellor does not perceive any thing in the evidence from which a greater allowance could be made for the maintenance of the complainant *Harriet*; nor, as the proceedings stand, can he direct any alteration as to the repairs, or the maintenance of the young negroes. And, with respect to the settlement of the guardian's account by the Orphans Court, he is under the impression, that the balance of £288 12s. 7d. supposing it not altered materially by the succeeding years, would give a value in negroes, estimated according to the appraisement, much greater than the one reported by account No. 4.

DECREED, that, on the complainant's tendering, or offering, on condition of an immediate compliance with this decree, to deliver to the defendant the possession of the nine and three-quarters acres of land, and the negro girl, mentioned in the proceedings, as part of the consideration from the defendant, on account of which the receipt, or release exhibit No. 6, was given, the defendant *Lyde Griffith*, do forthwith pay to the complainants, or bring into this court, the sum of two hundred and thirty-five dollars eighty-three cents, with interest thereon from the 19th day of December, 1813, till paid or brought in; and do also forthwith pay over and deliver to the said complainants the following negro slaves named and described in account No. 4; being one half of the personal estate in kind, to wit, one negro lad named *Ben*; one negro lad named *Joseph*; one negro lad named *Roderick*; one negro woman named *Lucy*; and one negro girl named *Henny*—the Chancellor having made the division or distribution in the manner stated by the auditor; because no cause has been shewn to the contrary, notwithstanding the service of the order of the 18th of January, on the defendant.

It is further DECREED, that the defendant *Lyde Griffith*, pay to the complainants their costs, amounting, as taxed by the register, to \$224.

The defendant appealed, and the Court of Appeals, at June term, 1816, affirmed the decree.

After which the plaintiffs, by their petition, stated that although they had given the defendant notice thereof, he had not complied therewith. Whereupon they prayed process to enforce obedience, (b) upon which it was, on the 26th of June, 1816, ordered that an attachment issue as prayed; and it was issued accordingly.

The defendant, on being taken into custody and brought before the court, put in his answer on oath, in which he admits, that he had been served with a copy of the affirmed decree as set forth; but he states, that it was agreed that they should have a meeting, at another time and place, when the terms of the decree should be complied with on both sides; and the plaintiffs then admitted, that they had in their possession property to which the defendant was entitled, which they promised to deliver up; and they also admitted that the defendant was entitled to credits which had not been given to him; that the defendant attended for some hours on the day, and at the place appointed, and the plaintiff not appearing, he went home, soon after which the plaintiff came to the defendant's house, having the negro girl, mentioned in the decree, with him, for the purpose, as he said, of delivering her up; and soon after they went upon the land in the possession of *Thomas Henry*, a tenant of the plaintiff's, when the plaintiff pulled down a part of the fence, rode into the field, and desired the defendant to take possession of the land, if he knew where it was, observing, that a part of it was in that field, and another part in woods; that the plaintiff did not pretend to deliver possession of any particular part, or to turn his tenant out of possession, who then persisted in holding possession until the expiration of his lease in November following; the plaintiff soon after went off, taking with him the negro girl; that the plaintiff has been enjoined by this court not to dispute the possession of his tenant. That the defendant is a citizen of, and resides in Montgomery county, which has been the place of his residence for several years; and the attachment was served

on him by the sheriff of Anne Arundel county, in the city of Annapolis; and the defendant denies that he intended any contempt, &c.

10th July, 1816.—KILTY, *Chancellor*.—This petition was argued by counsel on each side. Those parts of the answer, respecting further credit, could not have any influence on the question, and were not relied on in the argument. But it appears, that *Crapster* had not such a possession of the land as to enable him to make a valid tender of it, under the decree; and, supposing, as contended, that *Griffith* was unwilling to comply with the decree, he ought not to be compelled so to do, without receiving what he is entitled to, which he might otherwise have to seek for after a compliance on his part. The objection as to the manner of offering the possession, would not be material, if *Crapster* held the land; because *Griffith* must have known where it lay.

As to the objection on the ground of residence, it appears, that by the practice in England, a person found in London may be attached there, though residing in a different county. I do not know, that a case of the kind has before occurred here; but it is not material in the present case, as, for the reasons above stated, the respondent *Lyde Griffith*, is discharged from the attachment, leaving the decree to be proceeded on hereafter, so as to have it finally executed.

After which, on the 31st of May, 1817, this plaintiff *Basil Crapster*, filed another original bill against this defendant *Lyde Griffith*; in which he refers to and invokes the proceedings of the former suit into this; and then states, that the defendant had retained and received the profits of the negroes allotted to this plaintiff until the last day of November, 1816; that the commission, in the former case, under which proof had been taken ascertaining the sex and age of all the negroes in the possession of the defendant, which were of the estate of the late *Vachel Dorsey*, was closed on the 8th of September, 1810; since which time, and before the decree of the 12th of February, 1814, *Lucy*, one of the negroes decreed to the plaintiff, had had two children, the one named *Alfred*, and the other named *Cuffee*; and that *Milly*, another of the negroes decreed to the plaintiff, had also had a child in the same interval of time, named *Eliza*; which three negro children the defendant refused to deliver, and claimed as his own. That *Harriet*, the wife of this plaintiff, had joined him in a

deed conveying all her real estate, in the proceedings mentioned, to *Dennis D. Howard*, who had conveyed the same to this plaintiff; after which she died. That the defendant had, while he acted as guardian of the late *Harriet*, and during her minority, obtained from the land office, a warrant to affect some vacancy, under which he had obtained a patent for nine and three-quarters acres of vacancy adjoining her land, which was obtained for her benefit. That the plaintiff had not been able to deliver possession of the land to the defendant, as directed by the decree; because he could not ascertain its true location; and the defendant had taken no steps to ascertain it; but intended, as the plaintiff believed, to throw down the fences, and expose the plaintiff's crops to great damage, under pretence of resorting to the land he had so obtained. Whereupon it was prayed, that the defendant might be ordered to deliver to the plaintiff the negroes, born after the close of the commission, and before the decree; to account for the value of the labour of the other negroes, from the 19th of December, 1813, the date of the auditor's report, to the last day of November, 1816, when they were delivered: to convey to the plaintiff the adjacent vacant land for which he had obtained a patent, upon being refunded the amount of expenses incurred in obtaining the same; and that he might have such other relief as was suited to the nature of his case.

The defendant, in his answer to this bill, admits the proceedings in the former suit, and that he had not delivered the negroes before the time mentioned; because the plaintiff had failed to comply with the terms of the decree on his part; that he then held the three negro children, as alleged; because he believed himself to be lawfully entitled to them. That he had not taken up any vacant land adjacent to the land of his ward, or for her use; but had obtained a patent for some land, for which he had fully paid. And he further alleged, that as it appeared to be the object of the plaintiff to have the former decree opened, and the case reheard, he prayed to be permitted to introduce and substantiate sundry claims and allowances, as then specified, which he had not obtained the benefit of under the former decree.

The plaintiff put in a general replication to this answer; upon which a commission was issued, and the depositions of several witnesses taken and returned on the 18th of January, 1819. After which the case was brought before the court.

10th October, 1819.—KILTY, *Chancellor*.—DECREED, with the assent of the parties, that the auditor state an account between the parties, upon the evidence in the cause, or such other evidence as shall be produced by either party; reserving, nevertheless, all equity, as to the right of the party to claim an account, until the final hearing.

On the 17th of June, 1820, the auditor reported, that on the application of the plaintiff, he had given notice as usual, that he would attend, on a certain day, to take any further testimony; but none having been offered, he had since carefully read and considered the proceedings and the testimony already had; and having first prepared from them the estimates accompanying this report, he had stated an account between the parties, wherein the defendant is charged with the value yearly, according to the estimates of the services of the negroes heretofore allotted to the complainant; that is to say: from the 19th of December, 1813, to which time the first account was carried, until the 30th of November, 1816, when they were delivered; and with interest as usual. And he is credited for the board, &c. of the complainant's wife from the 9th of January, 1809, when the allowance therefor, in the first account, was discontinued until April following, when, it is now proved, she left the defendant's house—for the services of *Negro Maria*, according to the estimate from that time until she was returned to him—for the expense, according to an estimate, of raising the negro child *Hanson*, until the 30th of November, 1816—for one-half the expense, also, of raising the negro children *Alfred*, *Cuffee*, and *Eliza*, from the 19th of December, 1813, until they respectively attained the age of seven years—for a sum paid the commissioners for dividing certain lands of *Capt. Philemon Dorsey*, and for interest; leaving due to the complainant a balance of \$291 77, with interest thereon from the 19th of December, 1819, until paid.

The auditor further states, that he could not make any allowance for the nine and three-quarters acres of land; because of the absence of testimony, from which its annual value might be estimated. For expenses of raising the young negroes heretofore, as aforesaid allotted to the complainant, he makes no allowance; because the account then taken, up to the 19th of December, 1813, was predicated upon an assumption, that the negroes of *Vachel Dorsey* were indisputably worth yearly the interest of the sum at which they were appraised, over and above the expense of raising

their increase. And if there were any inequality in the duration of them, it is now too late to rectify it, directly or indirectly. It was made from a view of the testimony then had, with notice to the defendant, both before and after it was made; and then confirmed by the court in the absence of any objection on his part, notwithstanding such notice.

The valuation of the two negroes, *Walter* and *Mary*, said to have been returned in the inventory, and to have died some time afterwards, does not appear in this inventory or elsewhere. They are not even named in it; and all the negroes are valued together, and not separately. And the auditor is not satisfied, that if so returned, and since dead, they have not been already passed to the credit of the administrators in their final account rendered to the Orphans Court. Of the fees and taxes, and their amount, said to have been paid by the defendant for account of his ward, or of any other payment or expenditure with which his ward's estate was chargeable, either for the whole, or in part, having been made by the defendant, and not credited him somewhere, there is no sufficient proof.

The auditor further states, that he does not see how he can aid the court in apportioning the negro children *Alfred*, *Cuffee*, and *Eliza*, born since the time to which the first division related; no evidence having been taken under the commission from which the value of each might be collected, as was done before. All he can do is to report to the court, that from the testimony in the cause, it appears, that *Alfred* is now about ten years of age, and that *Cuffee* and *Eliza*, are between seven and eight years old.

The defendant excepted to this report of the auditor; *first*, because the charges in the account for the hire of the negroes allotted to the complainant in the former suit, are extravagant; *second*, because no allowance ought to be made for the same, as the complainant did not comply with what was required by the decree on his part; *third*, because more ought to have been allowed to the defendant for the expenses, &c. for which he is allowed a credit; *fourth*, because he had not allowed the defendant the credits to which his proofs entitled him; *fifth*, because, as the complainant claims more negroes than were allowed to him in the former decree, it is competent to the defendant, in answer to said claim, to prove, that he has already received more than his proportion of all the negroes; *sixth*, because, as complainant, agreeably to proof, received negroes to which he is not entitled, it is contrary

to all equity that he should now be allowed for the hire of those negroes ; *seventh*, because credit is not allowed the defendant for the two negroes, *Walter* and *Mary*, who had died before the former decree ; and *eighth*, because no allowance had been made to the defendant for the expense of raising the young negroes, born since the death of *Vachel Dorsey*, which have been allotted to the complainant.

12th January, 1821.—KILTY, Chancellor.—This suit being ready for hearing, was argued by counsel on each side, on exceptions to the auditor's report, and on the equity reserved by the interlocutory decree made by consent of the parties.

On considering the proceedings, I have formed the following opinions on the case ; *first*, that the decree in the suit by *Crapster* and wife, against *Griffith*, as affirmed by the Court of Appeals, is conclusive and cannot be opened for either party ; *secondly*, that the negroes born after the close of the commission, ought to have been brought in by a supplemental bill, and cannot be sued for by a new bill, having been in *esse* before the decree ; and *thirdly*, that the value of the labour of the negroes, from the time of the auditor's statement, ought not to be allowed in this suit, it being a subject proper either for the Court of Appeals, in the nature of an increase of damages, or interest ; or for a suit on the appeal bond. There is also a prayer in the bill for a conveyance of certain lands taken up, concerning which nothing was said in the argument ; and there is no ground for a decree.

DECREED, that the bill be dismissed with costs, to be taxed by the register.

From this decree the plaintiff appealed, and the case having been carried up to the Court of Appeals, and the solicitors of the parties fully heard there.

12th July, 1823.—By the Court of Appeals.—DECREED, that the decree of the Court of Chancery be reversed with costs in that court and in this. *Decreed*, that the appellant is entitled to one moiety of the negroes, born of *Lucy* and *Milly* after the execution of the commission, and before the passing of the decree in the suit brought by the appellant and his wife, against the present appellee in the Court of Chancery, and which is referred to and made part of the bill of complaint in this cause ; and that the appellant is entitled to recover the value of the labour of the negroes assigned to him by said decree, from the date of the auditor's statement, to wit :

the 19th day of December, 1813, to the period when the said last mentioned negroes were delivered to the appellant. And *Decreed*, that the Chancellor make and pass all necessary and proper orders for carrying this decree into full and complete effect.

The plaintiff by his petition, shewing this decree of the Court of Appeals, prayed that the case might be referred to the auditor, with directions to state an account accordingly, from the proceedings in the case, and on such testimony as he might be authorized to take, &c.

4th May, 1824.—JOHNSON, *Chancellor*.—On the present application, and in pursuance of the decree of the Court of Appeals of the 12th of July last, it is *Ordered*, that the auditor, from the evidence in the cause, or from such as may be taken before him, the usual notice being first given, report to this court the names and ages of the negroes born of *Lucy* and *Milly* after the execution of the commission, and before the passing of the decree in the suit brought by the appellant and his wife against the defendant in this court; as well as the value of each; in order that the complainant may obtain one moiety thereof. And it is further *Ordered*, in pursuance of the said decree of the Court of Appeals, that the auditor also state and return an account from the same evidence, the value of the balance of the negroes assigned to him from the date of the auditor's statements, to wit: the 19th of December, 1813, to the period when the said last mentioned negroes were delivered to the appellant.

On the 21st of September, 1825, the auditor reported, that on the application of the plaintiff and in execution of this order, he had given notice to the parties; and had, at the instance of the plaintiff, issued summons for his witnesses which having been served, the parties and witnesses attended, and some additional testimony having been taken by him; from all which he states, that the negroes born of *Lucy* and *Milly*, after the execution of the commission, and before the passing of the decree, are *Alfred*, about fifteen years of age, and of the value of \$280; *Cuffee*, about thirteen years of age, and worth \$250; and *Eliza*, aged thirteen years, and of the value of \$175. In considering the second part of this order, and the decree of the Court of Appeals, it was designed to execute, it occurred to him, they might have been intended to require, as they literally do, an account solely and

exclusively of the value of the labour of the negroes awarded to the complainant in the first suit, from the time to which the credit in that suit was carried, to the date of their delivery; and he accordingly stated the account A, making due from the defendant to the complainant, \$879 60, with interest on \$831 32, part thereof from the 19th of December, 1816, until paid.

Then supposing it might be desirable to the court, to have the defendant allowed, in such account, all credits he might appear to be entitled to, and charged further with what might appear to be properly chargeable to him for services of the said negroes *Alfred*, *Cuffee* and *Eliza*; he stated another estimate of the allowance to be made for the raising of young negroes until they attained the age of seven years; from the evidence here reported, considered together with that taken under the commission in this suit; and then the account B, being a continuation of the account reported on the 17th of June, 1820; correcting, according to the estimate so stated, the credits in that account for the maintenance of young negroes, and charging the defendant with half the value of the services of the said *Alfred*, *Cuffee* and *Eliza*, from the time they respectively attained the age of nine years, until the 19th of December next, the end of the year; and it makes due from the defendant to the complainant, \$669 64, with interest on \$520 75, part thereof, from the said 19th of December, 1825, until paid.

To this report the defendant excepted, 1st. Because it was not pursuant to the decree of the Court of Appeals, nor warranted by the testimony. 2d. Because so much of account B, as relates to errors in the former account of the 17th of June, 1820, is not authorized by the testimony nor by the order of the court. 3d. Because the valuation, in the latter part of account B, is not authorized by the decree of the Court of Appeals; and also, because it is made upon the evidence of one who has given contradictory testimony, and is also contradicted by other proofs. 4th. Because interest is charged. 5th. Because account A is not warranted by the testimony; and 6th. To both accounts, because credits to which the defendant is entitled, and which have never been allowed him, are not given.

The defendant, by his petition on oath, stated, that, in consequence of an agreement with the plaintiff to refer the case to arbitration, he had not caused his witnesses to attend and give evidence before the auditor. Whereupon he prayed, that the case

might be remanded to the auditor, with directions to take further testimony, &c.

13th October, 1825.—BLAND, *Chancellor*.—Ordered, that this case be, and the same is hereby returned to the auditor, to take such additional testimony as may be produced by either party, on giving the usual notice; and to correct his report and statements accordingly.

On the 20th of September, 1826, the auditor reported, that after having given notice to the parties, he had taken the depositions of several witnesses, from which he had corrected the estimates heretofore returned, and restated the accounts. On account A, the defendant is indebted to the complainant in the sum of \$824 43, with interest on \$779 22, part thereof from the 19th of December, 1816, until paid. On account B, the defendant is indebted to the complainant in the sum of \$603 93, with interest on \$475 71, part thereof from the 19th of December, 1825.

The plaintiff excepted to this report, and account B of the auditors, 1st. Because an allowance was made to the defendant for the maintenance of the negroes *Alfred*, *Cuffee* and *Eliza*; and he is charged with the value of their services. 2d. Because it refers to and is predicated upon an account reported 17th of June, 1820, wherein are included sundry charges and discharges not warranted by the decree of the Court of Appeals; and 3d. Because, by that decree the only matter of account between the parties is the value of certain negroes' services mentioned in account A.

The defendant excepted to the report of the auditor, 1st. Because too much was allowed for the services of the negroes. 2d. Because too little is allowed for the maintenance of the infant negroes. 3d. Because the complainant is not charged with the moneys omitted in the former account, and which he had admitted, as would appear by the testimony. 4th. Because interest is charged, which, under any circumstances, ought not to be allowed, and more especially when the complainant has not executed the decree requiring him to reconvey the land; and 5th. Because, until a division is made of the negroes born after the return of the commission, and before the final decree, the defendant is not chargeable with the services of any of them.

30th January, 1829.—BLAND, *Chancellor*.—The exceptions to the auditor's report standing ready for hearing, the solicitors of the parties were fully heard, and the proceedings read and considered.

The decree of the Chancellor having been reversed, and the case remanded to this court, with orders to execute the decree of the Court of Appeals; the auditor was directed to state an account accordingly, with a view to enable this court to perform the duty prescribed to it; which accounts the auditor finally stated and reported on the 20th of September, 1826. The substance of the exceptions taken to the accounts thus reported is, that neither the one nor the other of them conforms to the directions of the Court of Appeals.

The solicitors have allowed themselves to take a retrospective and large view of this case; and have thence argued, that the decree of the Court of Appeals cannot be taken in its literal sense; because it would, if so taken, produce the grossest injury to one; do complete justice to neither of the parties; and in no way cover the whole case upon which the court was called upon to adjudicate. For, by giving to the plaintiff nothing more than a bare moiety of the three negroes born of *Lucy* and *Milly*, he would lose his share of their hires and profits until they are divided, or sold, and delivered up. And by giving to the plaintiff the entire value of the labour of the other negroes, as specified, the defendant would be excluded from credits and deductions to which, from the nature of the whole case, he is most manifestly entitled. But this court cannot permit itself to indulge in any such wide range of review, or great latitude of construction.

When a decision is adduced as a precedent, affording evidence and illustration of the principles of equity, which it is urged should govern a new case, then under consideration, unless the rule be unambiguous and clear, it is certainly fit and proper to attend to all the circumstances upon which it is founded; and also to understand the reasons and arguments by which the mind of the court was brought to the conclusion which has been recorded as its judgment. Because in such instances the only object is to ascertain what is the law applicable to the case under consideration, which law does not consist in particular cases; but in general principles which run through and govern them. The principle is the thing which is to be extracted from cases, and to be applied to other cases. (c)

(c) *Rust v. Cooper*, Cowp. 633. *Walpole v. Cholmondely*, 7 T. R. 148. *Browning v. Wright*, 2 Boz. and Pul. 24. *Silk v. Prime*, 1 Bro. c. c. 138, n. *Perry v. Whitehead*, 6 Ves. 54. *Morgan v. Morgan*, 5 Mad. 410.

Here, however, this court has been entirely precluded from any such inquiry. The law of this case has been pronounced by the tribunal in the last resort; and it has been returned to this court with special directions as to the mode in which that law is to be carried into effect. *Interest reipublicæ res judicatas non rescindi.* It is, therefore, now wholly unimportant, as regards the matter under consideration, what was the nature of the case on which the decree of the Court of Appeals was founded; or what were the reasons which induced that court to give the directions it has done; since it is not the reason, or applicability of the law, so laid down, which is in any manner the subject of consideration at this time; but simply in what mode the directions given for executing an unalterable judgment can be most correctly and effectually complied with. Litigation must end somewhere. It is certain, that this court cannot, in any one particular, however unimportant, revise, correct, or alter, any order or decree of the Court or Appeals; and it is questionable, whether even that court itself, confined as it is, by the express provisions of the constitution, to the exercise of none other than a specified degree of appellate power over the decisions of the tribunals of original jurisdiction, can, after the close of the term at which its decree has been passed, grant a rehearing or bill of review for any cause whatever. (*d*)

This case has been carried to the ultimate tribunal, and a final decree obtained; which having been sent here to be executed in the mode prescribed, it consequently becomes my duty promptly to obey. I therefore deem it proper to pass by, without further notice, all those portions of the argument, respecting the incomplete nature and unjust operation of the decree of the Court of Appeals, which have been so strongly urged, and to proceed to the execution of it, according to its clear and unequivocal meaning.

It has been finally and very distinctly declared, that the plaintiff is entitled to recover the value of the labour of certain negroes. That value I conceive has been correctly ascertained by the auditor's account A. I shall, therefore, award it to the plaintiff accordingly. It has been further very perspicuously decreed by the Court of Appeals, that the plaintiff is entitled to one moiety of the negroes

(*d*) 1804, ch. 55, s. 5. *Barbon v. Searle*, 1 Vern. 416. *Penn v. Baltimore*, 1 Ves. 455. *Perry v. Whitehead*, 6 Ves. 547. *Willan v. Willan*, 16 Ves. 89. *Murray v. Coster*, 20 John. Rep. 603. *White v. Atkinson*, 3 Call. 376. *Campbell v. Price*, 3 Mun. 227. *Burn v. Posug*, 3 Desan. 614. *McCormick v. Sullivant*, 10 Wheat. 199. *Vattel*, b. 1, ch. 13, s. 165.

born of *Lucy* and *Milly*, who are admitted to be the three negroes *Alfred*, *Cuffee* and *Eliza*.

A partition of personal estate can only be obtained in a Court of Equity; and if the partition cannot be made in kind, this court has the power to order a sale for the purpose of converting the individual property into money, so as to make a correct division of the proceeds of the sale. These three negroes are incapable of a partition into moieties; and consequently, the decree of the Court of Appeals can only be carried into effect by a sale, which I shall order accordingly. (e)

DECREED, that the account A, as made and reported by the auditor, on the 20th of September, 1826, be and the same is hereby ratified and confirmed; and the account B, together with all the said exceptions in any manner impeaching the said account A, are hereby rejected and overruled. *Decreed*, that the defendant pay, or bring into this court to be paid to the complainant, the sum of \$824 43, with legal interest on \$779 22, part thereof, from the 19th of December, 1816, until paid or brought in, together with the costs of this court, and the costs in the Court of Appeals, to be taxed by the register. *Decreed*, that the three negroes *Alfred*, *Cuffee* and *Eliza*, in the proceedings mentioned, be sold, &c. That *Thomas S. Alexander* be appointed trustee to make the said sale, &c. That the terms of sale be ready money, &c.

From this decree the defendant appealed, and the case having been carried up, and the solicitors of the parties having been fully heard.

June term, 1831.—By the Court of Appeals.—DECREED, that the decree of the Court of Chancery, passed in this suit, on the thirtieth day of January, in the year eighteen hundred and twenty-nine, be, and the same is hereby reversed with costs. That account B, reported by the auditor to the Court of Chancery, on the 20th September, 1826, be, and the same is hereby confirmed, and all other accounts and statements inconsistent therewith, are hereby overruled. And that *Griffith*, the plaintiff in error, pay to *Crapster*, the defendant in error, the sum of six hundred and three dollars ninety-three cents, with interest on four hundred and seventy-five dollars and seventy-one cents from the 19th December, 1825, until paid.

And forasmuch as a sale of the three negroes *Alfred*, *Cuffee*, and *Eliza*, in the proceedings mentioned, is necessary, it is DECREED, that a sale of said negroes be made, as directed by the decree of the Chancellor, and upon such terms as are prescribed in said decree, or may be prescribed by the Chancellor, in any future order. That the Chancellor from time to time, pass any order in the premises which may be necessary, in order to a sale of said negroes, and distribution between the parties, of the proceeds of sale, after deducting all necessary expenses incurred in making the sale. And that in the account hereafter to be stated, relative to the proceeds of sale of said negroes and distribution thereof, the Chancellor shall allow to the defendant in error, his proportion of the just value of the services of the said three negroes, from the 19th December, 1825, until the plaintiff in error shall deliver up said negroes.

KIPP v. HANNA.

A *feme covert* defendant attached for not answering. The bill amended so as to charge, that an infant defendant had attained her full age, that she might be compelled to answer as an adult. Where there is a plurality of defendants, and a commission, with consent of some of them only, has been issued, the testimony so taken cannot be read against those who had not consented to the issuing of the commission.

The rule is, that a voluntary conveyance must be deemed void, as against creditors, where the grantor could not, at the time, have withdrawn the amount from his estate, without hazard to his creditors, or materially lessening their prospects of payment. None but those who were creditors, at the time, can sue to have a voluntary conveyance set aside as fraudulent; but when such a conveyance has been so vacated, then all other creditors may come in for satisfaction, in full, or in due proportion. The holders of property under a fraudulent conveyance, accountable for the rents and profits of it, from the time it was so unjustly withheld from the creditors.

THIS bill was filed on the 26th of February, 1820, by *John Kipp* and *Amos Brown*, against *Alexander B. Hanna* and *Sarah*, his wife, *William Warner*, *Sarah Hanna, Jr.* *Mary Hanna*, *Andrew Hanna*, *John Hanna*, *Robert Hanna*, *Paul Jacquin*, *Andrew Hall*, *Thomas Tyson*, and *Frederick G. L. Burhing*. The bill stated, that the defendant *Alexander*, being entitled to, and in possession of a chattel interest in a house and lot, in the city of *Baltimore*, conveyed it to *John P. Boyreau*, who conveyed it to the defendant

Paul Jacquin, to secure the payment of the sum of \$1346 50; after which *Boyreau* conveyed it to the defendant *Frederick G. L. Burhing*, to secure the payment of \$663; after which *Boyreau* reconveyed it to the defendant *Alexander B. Hanna*; that on the 22d of July, 1817, the defendant *Alexander*, being largely indebted to sundry persons, and intending to defraud his creditors, and to secure this chattel real for the benefit of himself and family, fraudulently, and without a sufficient and lawful consideration, made a conveyance thereof to the defendant *William Warner*, in trust, for the separate use of his wife, the defendant *Sarah*, during her life, and after her death to his five infant children, the defendants *Sarah Hanna, Jr. Mary Hanna, Andrew Hanna, John Hanna, and Robert Hanna*; that on the 26th of December, 1818, the defendant *Alexander*, applied for the benefit of the insolvent laws; and these plaintiffs were, on the 11th of February, 1819, appointed his trustees, and so became entitled to all his property, in trust, for the benefit of his creditors; that the defendant *Jacquin*, on the 28th of December, 1819, applied for the benefit of the insolvent law; and the defendants *Hall* and *Tyson*, were appointed his trustees; that both of the liens, or incumbrances, of the defendants *Jacquin* and *Burhing*, have been fully satisfied with money, provided by the defendant *Alexander*; but have been kept on foot the better to conceal his fraud: and that the defendants *Andrew Hanna* and *Frederick G. L. Burhing* do not reside in this state. Whereupon the bill prayed, that the chattel real might be delivered up, and sold for the benefit of the creditors of the defendant *Alexander*, discharged from all incumbrance; that the defendant *Warner*, might account for the rents and profits; and that the plaintiffs might have such other relief as was suited to the nature of their case.

An order of publication was passed, warning the absent defendants to appear and answer on or before the 31st of July, 1821, which was published as directed.

The defendant *Alexander B. Hanna*, on the 2d of December, 1820, put in his separate answer in which he said, that he had conveyed the property to the defendant *Warner*, as stated in the bill, for the purpose of securing to his wife her separate fortune, amounting to about \$5,000, which he had received and agreed to settle on her; that he was then in good and solvent circumstances, and owned effects sufficient to pay all his debts, leaving a very considerable surplus, without the property so conveyed; that he

afterwards met with considerable losses at sea, and otherwise, by reason whereof he was compelled to take the benefit of the insolvent laws, as stated; and he denied all fraud, &c. To this answer the plaintiffs filed exceptions on the 15th of December, 1820.

The defendant *Warner*, by his answer, admitted, that the conveyance was made to him, as set forth in the bill, and said, that afterwards the defendant *Sarah*, the wife of *Alexander*, furnished him with \$1698 42, with which he had satisfied the claims upon the property held by the defendants *Jacquin* and *Burhing*; that, ever since the execution of the deed to him by the defendant *Alexander*, the property had been held and enjoyed by his wife and children; and this defendant denied all fraud, &c.

After the subpoena against *Jacquin* had been returned summoned, and, before he had answered, his death was suggested; and the case thus abated as to him.

The defendant *Tyson*, by his answer, admitted, that he had been appointed one of the trustees of the defendant *Jacquin*; but averred, that he had no knowledge of any other matter set forth in the bill.

The defendant *Hall*, by his answer, admitted, that he had been appointed one of the trustees of the defendant *Jacquin*, as stated; but averred, that he had never accepted the trust; and disclaimed all interest in this suit.

15th December, 1820.—KILTY, Chancellor.—On motion it is Ordered, that the bill be dismissed as against the defendant *Andrew Hall*, with costs.

The defendant *Sarah*, wife of the defendant *Alexander*, having failed to answer, and having been attached, for not answering; the plaintiffs, by their petition, prayed, that she might be brought before the court, &c.

13th July, 1821.—KILTY, Chancellor.—Ordered, that the sheriff of Baltimore county, bring into court the defendant *Sarah Hanna*, on the 21st day of the present month, the said *Sarah Hanna*, being returned by him attached for not answering the bill in this suit. (a)

Soon after the passing of this order, the defendant *Sarah*, the wife of *Alexander*, put in her separate answer, in which she ad-

mitted the conveyance of the property, to the use of herself and her children, was made as set forth in the bill ; but she averred, that it was made in consideration of her fortune, amounting to about \$5000 ; that the house on the lot was erected with her money so paid to her husband ; that he was in good and solvent circumstances at the time he made the conveyance ; and she denied all fraud, &c.

The infant defendants *Mary*, *John*, and *Robert*, answered by their guardian *ad litem*, and admitted the execution of the conveyance by their father as set forth ; but averred, that he was then in solvent circumstances ; and prayed that their interests might be protected, &c.

The plaintiffs, by their petition, stated, that the defendant *Sarah Hanna, Jr.* had attained her full age, since the issuing of the commission to take the answers of the infant defendants, and had refused to answer their bill of complaint. Whereupon they prayed process against her, &c.

19th November, 1822.—JOHNSON, *Chancellor*.—Leave is given to amend the bill, so as it shall appear by the bill, that the person, in this petition mentioned, has arrived at full age ; and a *subpœna* being served on her, if disregarded, the necessary compulsory process will issue.

After which the defendant *Sarah Hanna, Jr.* put in her answer, in which she admitted the execution of the conveyance by her father, as charged in the bill ; but declared, that he was then solvent, as she had heard and believed ; and that she had no knowledge of any other matters set forth in the bill.

The plaintiffs' solicitor, by an application in writing, prayed, that a commission might issue to take testimony, &c. To which a solicitor, who appeared only for the defendants, *Alexander B. Hanna* and wife, and *Sarah* their daughter, subjoined his consent in these words, "the undersigned, as counsel for such of the above defendants as he appears for, consents to the above commission as prayed for by the complainants," upon which, on the 24th of April, 1823, the Chancellor said "let the commission issue ;" and it was issued accordingly.

On the 15th of December, 1823, the plaintiffs, by their petition, stated, that the infant defendant, *Andrew Hanna*, had returned to this state, and was then a resident of the city of Baltimore, but

had not answered. Whereupon they prayed a *subpœna* against him; which was ordered accordingly.

The infant defendant *Andrew Hanna*, on the 3d of May, 1824, put in his answer by guardian *ad litem*, in which he stated, that he had been informed and believed, that his father had executed the conveyance as set forth in the bill; but he averred, that it was made for a valuable consideration, and at a time when he was solvent, &c.

Under the commission which had been issued upon the order of the 24th of April, 1823, the depositions of witnesses were taken, and several instruments had been authenticated, all of which were returned and filed on the 8th of June, 1824; and after the commission had remained on file the time required, the plaintiffs entered on the docket, a rule hearing next term; and the case was accordingly brought before the court.

18th March, 1825.—BLAND, *Chancellor*.—The counsel for the defendants insisted that the case was not in a situation to have been set down for hearing; and therefore, that the rule hearing was erroneously or improvidently entered upon the docket. And they also objected, that the defendant *Sarah*, the wife of *Alexander*, should not have been made to answer separately, but jointly with her husband; of that, however, the Chancellor deems it unnecessary now to say any thing. It is obvious, that the case is not now ready either for a reference to the auditor, or for a final hearing.

After which, the attention of the court was again called to the case, with a request to reconsider this matter.

28th April, 1825.—BLAND, *Chancellor*.—The Chancellor has again carefully looked over the papers, as requested by the plaintiffs' solicitor, and finds nothing to remove the objections taken to the manner in which the commission was issued under which the testimony has been taken. It appears that the defendant *Andrew Hanna*, could not have given his consent to the order of the 24th of April, 1823, either in person or by counsel; and therefore as to him, and as to all the other defendants, not represented by the solicitor who assented to the issuing of that commission, it could only have been issued in the regular mode of conducting adverse proceedings, which was not the case; and consequently, the testimony, as taken, can be of no avail against any but the three defendants, with the consent of whose solicitor it was taken, and the case is not in a situation to have the bill taken *pro confesso*, against

any one but the defendant *Burhing*. Nor does it appear that the exceptions to the answer of the defendant *Alexander B. Hanna*, have been in any way disposed of.

The plaintiffs, by their petition, filed on the 16th of June, 1825, stated, that the chattel real in controversy had been and then was held by the defendants *Alexander B. Hanna* and wife; that he was insolvent; and that, anticipating the termination of this suit against them, they had suffered the ground rent to fall greatly in arrear; whereupon, it was prayed, that the property might be put into the hands of a receiver.

A day having been given for the hearing of the matter of this petition, it was answered by the defendants *Alexander B. Hanna* and wife; and the solicitors of the parties were heard.

4th October, 1825.—BLAND, Chancellor.—A receiver may be appointed against the legal title in a strong case of fraud, combined with danger to the property. In such cases, the court may, on affidavits, interfere before the hearing. But the court interposes by appointing a receiver against the legal title with reluctance. It must not only be morally sure, that, at the hearing, the party would, upon those circumstances, be turned out of possession; but must see some imminent danger to the property and the intermediate rents and profits, from not acting rather prematurely, and if the property should not be taken under the care of the court. It is conceived, that according to these principles, this is not such a case as the Chancellor would be warranted in appointing a receiver. Therefore, it is *Ordered*, that the petition be dismissed with costs. (b)

After which, the exceptions to the answer of the defendant *Alexander B. Hanna*, having been sustained, he put in a full answer, as required, on the 22d of March, 1826. Subsequently to which, the plaintiffs, by their petition, prayed for a commission to take evidence, &c.

15th April, 1826.—BLAND, Chancellor.—The order of publication having been published as required, warning *F. G. L. Burhing* to appear, and the general replication to the answers of all the other defendants having been put in by the plaintiffs; it is

(b) Pow. Mort. by Covin. 295. n.; *Williamson v. Wilson*, 1 Bland, 422. *Hannah K. Chase's case*, 1 Bland, 213.

therefore *Ordered*, that a commission issue as prayed, unless the defendants name and strike commissioners on or before the 30th instant.

After which, under a decree to account, passed by consent on the 21st of July, 1826, the auditor reported accordingly ; to which report the defendants excepted ; and the case having been set down for hearing, was brought before the court.

8th August, 1829.—*BLAND, Chancellor.*—This case standing ready for hearing, and having been submitted without argument by the plaintiffs' solicitor, and no one appearing for the defendants, according to the rule, before the close of the sittings of the term, the proceedings were read and considered.

From the position taken by the plaintiffs, it becomes necessary to inquire what were the circumstances under which *Alexander B. Hanna* conveyed this property in trust for the benefit of his wife and children. His trade, pursuits, and pecuniary condition, are not clearly described in the pleadings ; nor has it been distinctly set forth what was the value of this donation to his wife and children, compared with the whole property he then held, and the amount of the debts he then owed. But taking the pleadings and proofs together, it appears, that *Alexander B. Hanna* was by trade a boot and shoemaker ; and, on the 22d of July, 1817, exclusively engaged in that calling ; that he held some property, at that time, is certain ; but the particulars and value of it are not clearly shewn. About that time he lent money ; but the lending of money is, in itself, no clear evidence of his solvency to that or any other amount. It appears that in the year 1818, he held lots of ground, which he sold for \$1300 ; and that, on the 22d of July, 1817, he owed debts, which are still unpaid, to the amount of \$1267. It is in proof, that the mortgages were satisfied by money, or means provided by *Alexander B. Hanna*, after he became embarrassed, and a short time before he obtained the benefit of the insolvent laws. A part of the money lent by *Niles*, the witness, was paid by him to *Warner*, the trustee. From the deposition of *Niles*, and from other testimony, it appears, that the donation thus formally made, by the conveyance of the 22d of July, 1817, by *Alexander B. Hanna*, to his wife and children, was not cleared of all incumbrance, and perfected, until he had fallen into difficulties, and was upon the eve of applying for the benefit of the insolvent laws. *Alexander B. Hanna* says in his answer, that the consideration of

the conveyance of the 22d of July, 1817, was the fortune of his wife, and an agreement that it should be settled on her for her separate use, but there is no proof to that effect.

There are many cases, reported in the books, which speak in general terms of a voluntary conveyance of property for the benefit of a wife and children being void against creditors, where it appears that the grantor was indebted at the time. From which it seems to have been inferred, that the being indebted, at all, at the time, in any sum, however small, was sufficient to vacate the conveyance; that the being at all indebted, raised such a legal presumption of fraud, as could not be repelled by any consideration arising from the amount of the debts, or the extent of the property conveyed, or the circumstances of the party. But, in those cases, other circumstances rendered it unnecessary to take into consideration the value of the property conveyed, in comparison with the then amount of the debts and estate of the grantor, as an evidence that the voluntary conveyance had been made with an intention to defraud creditors. (c)

It is laying down the doctrine much too large, to say, on the one hand, that all voluntary conveyances are void, if the grantor be at all indebted at the time; and, on the other, that they are good, if he be not at the time actually insolvent. The true rule, by which the fraudulency or fairness of a voluntary conveyance is to be ascertained, in this respect, is founded on a comparative indebtedness; or, in other words, on the pecuniary ability of the grantor, at that time, to withdraw the amount of the donation from his estate, without the least hazard to his creditors, or in any material degree lessening their then prospects of payment. (d)

Where a parent, who was worth at the time seven or eight thousand pounds, and in prosperous circumstances, made a gift to his daughter of a piece of property worth no more than seven hundred pounds, the conveyance, although merely voluntary, and without any valuable consideration, was deemed valid. (e) On

(c) *Shaw v. Standish*, 2 Vern. 326. *Jones v. Marsh, Forrest*, 64. *Russel v. Hammond*, 1 Atk. 13. *Walker v. Burrows*, 1 Atk. 93. *Stileman v. Ashdown*, 2 Atk. 481. *Middlecome v. Marlow*, 2 Atk. 520. *White v. Sansom*, 3 Atk. 412. *Townshend v. Windham*, 2 Ves. 10. *Stephens v. Olive*, 2 Bro. C. C. 90. *Battersbee v. Farrington*, 1 Swan. 113. *Richardson v. Smallwood*, 4 Cond. Chan. Rep. 262. —(d) *Lush v. Wilkinson*, 5 Ves. 387. *Peigne v. Snowden*, 1 Desau. 591. *Tunno v. Trezevant*, 2 Desau. 270.—(e) *Jacks v. Tunno*, 3 Desau. 1.

the other hand, where a father, who had not been legally declared insolvent, but was in embarrassed and sinking circumstances, made a voluntary conveyance of a considerable proportion of his property to his child, it was deemed void against his creditors; (*f*) and so too, where such a conveyance was made by one not then indebted; but with a view to his becoming indebted, it was deemed fraudulent. (*g*) For it has been long settled, that when a man, being greatly indebted to sundry persons, makes a gift to his son, or one of his blood, without consideration, but only of nature, the law intends a trust between them; (*h*) and this rule is the same both at law and in equity. (*i*) It is this presumed trust that affords the evidence of an intended fraud against creditors; because it is perfectly evident, that a man who is greatly indebted, cannot, nor ought not, to be allowed to reserve for his own use, or to give away his property to the prejudice of his creditors—and consequently no donation can be permitted to stand against them, where it is at all doubtful, whether or not the remaining property of the grantor will be sufficient to satisfy all his debts, (*j*) although the fact of the grantors being totally insolvent at the time, would be conclusive evidence of the fraudulent character of the conveyance; yet his being at the time indebted in some small amount, compared with his property and circumstances, and the value of the donation, would not, of itself, and alone, affect the validity of the conveyance; because every man must be indebted for the common bills of his house, though he pays them every week. (*k*)

In the case under consideration, it appears that *Alexander B. Hanna* was a tradesman, in no very extraordinary affluent circumstances; his household furniture formed a considerable part of his estate, even according to his own reckoning; and, counting up his whole fortune, the house and lot, in controversy, formed a large and important portion of it; yet with debts, then due and still unpaid, amounting to between twelve and thirteen hundred dollars, he made this voluntary conveyance of that very large and important portion of his estate, in trust for the benefit of his wife and children; which donation, however, he had not finally perfected, by

(*f*) *Croft v. Townsend*, 3 Desau, 231; *Broadfoot v. Dyer*, 3 Mun. 350; *Chamberlayne v. Temple*, 2 Rand. 334.—(*g*) *Stileman v. Ashdown*, 2 Atk. 481; *Richardson v. Smallwood*, 4 Cond. Chan. Rep. 262.—(*h*) *Twyne's case*, 3 Co. 81.—(*i*) *Russel v. Hammond*, 1 Atk. 14.—(*j*) *Walker v. Burrows*, 1 Atk. 93; *Taylor v. Jones*, 2 Atk. 602.—(*k*) *Lush v. Wilkinson*, 5 Ves. 387; *Kidney v. Coussmaker*, 12 Ves. 155; *Nunn v. Wilsmore*, 8 T. R. 529.

clearing it of all incumbrances, until after he became much embarrassed in his pecuniary affairs, and just before his legally avowed insolvency. I am, therefore, perfectly satisfied, that this deed of the 22d of July, 1817, must be deemed altogether fraudulent and void as against the creditors of the defendant *Alexander B. Hanna*.

These plaintiffs represent, as well those who were creditors of *Alexander B. Hanna* at the time he executed the deed of the 22d of July, 1817, as those who had become so since that time, and prior to his obtaining the benefit of the insolvent laws. Upon the principle, that an estate obtained by fraud can only be vacated by him who has the prior right; (*l*) it has been settled, as a general rule, with some few exceptions, that no creditor can have a voluntary conveyance set aside, on the ground of its having been made to his prejudice, unless he was a creditor at the time the conveyance was made. But it has also been long well established, that where a voluntary conveyance has been vacated for the benefit of those who were creditors at the time, all subsequent creditors may be let in to participate of the funds. (*m*)

Hence, in this case, although there are only a portion of the creditors, represented by these plaintiffs, at whose instance this bill could have been originated and sustained for vacating this deed of the 22d of July, 1817; yet on its being annulled, all the others must be allowed to come in and partake of the benefit of the decree; and the proceeds must be apportioned among them in due course of distribution, according to the provisions of the insolvent laws.

The bill also claims an account of the rents and profits of this property during the time it has been thus unlawfully withheld from these plaintiffs, under the pretext of this fraudulent conveyance. This right to rents and profits, it is evident, arises as a necessary consequence of the judgment, that this deed of the 22d of July, 1817, is void, as against the creditors represented by these plaintiffs; from whose use, the property has been unjustly withheld from the time *Alexander B. Hanna* applied for the benefit of the insolvent laws; at which time all his property vested in these plaintiffs, and ought to have been surrendered and delivered up to them

(*l*) *Twyne's case*, 3 Co. 83.—(*m*) *Walker v. Burrows*, 1 Atk. 93; *Lush v. Wilkinson*, 5 Ves. 386 n.; *Kidney v. Coussmaker*, 12 Ves. 156 n.; *Richardson v. Smallwood*, 4 Cond. Chan. Rep. 262.

accordingly, as trustees for the benefit of his creditors. I shall, therefore, direct that this property be sold for the benefit of all the creditors, represented by these plaintiffs; and further, that an account be taken of its rents and profits, to the end, that those who have received them may be ordered to pay over the amount to these plaintiffs, to be applied in like manner, for the benefit of the creditors they represent.

DECREED, that the bill of complaint, as against the defendant *Frederick G. L. Burhing*, be, and the same is hereby taken *pro confesso*; that the said conveyance in the proceedings mentioned, bearing date on the 22d of July, 1817, be, and the same is hereby declared and deemed to be fraudulent, and absolutely null and void against the creditors of the defendant *Alexander B. Hanna*, for whose use these plaintiffs sue—and that the property in the proceedings mentioned be sold; that *John Scott*, be, and he is hereby appointed trustee to make the sale, &c. &c.

And it is further *Decreed*, that the plaintiffs are entitled to have and receive, for the use and benefit of the creditors represented by them, the full amount of the rents and profits of the property in the proceedings mentioned, from such of the defendants as shall be found to have held, used and occupied the same, from the 26th day of December, 1818, when the said *Alexander B. Hanna* applied for the benefit of the insolvent laws, up to the time when the said property shall have been delivered up to the plaintiffs, or shall be sold by the said *John Scott*, who has been hereby appointed trustee to make sale thereof; therefore to enable the court correctly to ascertain and specify the whole amount of the rents and profits to which these plaintiffs are so entitled as trustees; it is *Ordered*, that this case be, and the same is hereby referred to the auditor, with directions to state an account accordingly, from the pleadings and proofs now in the case, and from such other proof as may be laid before him. And the parties are hereby authorized to take testimony in relation to the said account of the rents and profits, before any justice of the peace, on giving three days notice as usual, provided, that the said testimony be returned and filed in the chancery office, within twenty days after the day on which the trustee, *John Scott*, shall have made and filed his report of the sale of the said property.

And it is further *Decreed*, that the said report of the auditor filed on the 13th of March, 1827, so far as the same is in any manner at variance with this decree, be, and the same is hereby set aside and rejected; and the residue thereof is hereby affirmed.

WELCH v. STEWART.

In a creditor's suit, the decree for a sale establishes the plaintiff's claim; unless it be otherwise declared; except as regards a fraud not put in issue and decided on by such decree. A plaintiff cannot be permitted to split up and multiply his causes of action; and therefore, if he knowingly withholds a part of his claim until after the decree for a sale, it will be rejected; but without prejudice. In a creditor's suit the statute of limitations continues to run against a creditor who comes in, before or under the decree, until he files his petition or the voucher of his claim; but no one can rely on the statute against a claim, after any act done, or sanctioned by him, which implies an abandonment of such a defence, or that the claim is to be met upon its merits.

THIS bill was filed on the 2d of August, 1827, by *Robert Welch*, of *Ben.* and others, as creditors of *David Stewart*, deceased, against *Henry H. Stewart* and others, the administrator, heirs and legal representatives of the late *David Stewart*. The bill sets forth, that the late *David Stewart* was indebted to several persons in the manner described, to which claims the plaintiff *Welch* had become entitled; that the deceased debtor had, in his life time, conveyed certain property in trust for the benefit of the creditors named in the deed of trust, some of which claims are those which have been assigned to the plaintiff *Welch*; that the late *David Stewart* died siezed and possessed of other property, not so specially appropriated; and that his whole estate, both real and personal, was insufficient to pay his debts. The heirs, administrator and trustee, who were all made defendants, by their answers, admitted the truth of the allegations of the bill. Whereupon it was DECREED, that the estate be sold; that notice be given to the creditors of the deceased to come in; and that the administrator account. The property was accordingly sold. After which, on the 4th of December, 1828, *Evans* and others, filed their petition, stating that they also were creditors of the deceased; and that they objected to the allowance of certain claims of the plaintiff *Welch*.

The auditor, on the 4th of February, 1829, reported a statement of the claims of the plaintiffs, and others who had come in as creditors of the deceased. *Evans* and others excepted to the account allowing the plaintiff *Welch's* claims, Nos. 1, 2 and 5; because they had not been established by any evidence, as against them and others, the creditors of the late *David Stewart*; and for these reasons they, in like manner, objected to the allowance of the

plaintiff *Welch's* claim No. 3; and also, because it was not mentioned or demanded in the bill in any form whatever.

16th March, 1829.—BLAND, *Chancellor*.—The exceptions to the auditor's report standing ready for hearing, and the solicitors of the parties having been heard, the proceedings were read and considered.

I take it to be a well settled rule of this court, that on a creditor's bill, the decree for a sale, in the usual general terms, virtually and necessarily establishes the claims of all the originally suing creditors, unless some of them should, by the decree itself, be specially excepted; since it is very clear, that no sale can be ordered, but to pay some one or more debts which have been established to the satisfaction of the Chancellor. (a) But such a decree only establishes the claim of the plaintiff as a debt due from the estate of the deceased debtor, without prejudice to third persons, and consequently, if any others, who may have been allowed to come in as parties to the suit, can shew fraud or any other circumstance by which it shall appear that the debt, as so far established, ought not to be permitted to stand in the way of their interests, it may be then shewn and taken advantage of; because the introduction and reliance upon any such new and collateral matter is not in any way incompatible with an admission of the stability of any of those points which had been previously adjudicated upon and determined by the decree.

But no such new matter having been advanced and relied upon, as a cause why these claims, Nos. 1, 2 and 5, should be rejected altogether, or postponed in favour of, and to make way for the satisfaction of the claims of these excepting creditors, they must stand as having been established against the estate of the deceased. And the claim No. 1, as inclusive of No. 2, having been secured by the deed of trust, in the manner set forth by the bill, must be allowed a preference of satisfaction out of the proceeds of the trust fund; since it has not been alleged or shewn that there was any infirmity in the deed of trust as regarded other creditors, not provided for by it; or that this was not, in fact, one of the debts intended to be secured by it. The proceeds of the trust fund, must therefore be first applied in satisfaction of the claim No. 1, as including No. 2; and the surplus, if any, together with the proceeds of the other portion of the deceased's estate to

(a) *Strike's case*, 1 Bland, 70; *Williamson v. Wilson*, 1 Bland, 441.

the satisfaction of claim No. 5, and of all others which may be established in due course of administration.

It is admitted, that the plaintiff *Welch's* claim No. 3, is one which has not been set forth and demanded by the bill; and therefore, that it cannot be deemed to have been established by the decree; even supposing that it might be introduced after the decree, as an addition to the amount so claimed by him. But a plaintiff cannot be allowed to split up, and multiply his causes of action; nor to introduce any other claim, and call the court back to adjudicate upon it, after a decree has been passed, at his instance, by which it might have been embraced had it been set forth and demanded in his bill. (b) For in equity, as at law, where a plaintiff has several claims, the satisfaction of all of which might be demanded in one suit, or a satisfaction of each of which might be demanded by a separate suit, he may, at his election, seek satisfaction by one, or by several suits. (c) But if, by a creditor's bill, he sets forth and asks satisfaction of only one of his claims, he must, thereby, be taken to have waived all right to demand satisfaction in that suit of any other claim which he then had and might have brought before the court. Under such circumstances, therefore, by analogy to the rules prescribed for executors and administrators, (d) the court will proceed to distribute the assets among the creditors of the deceased, to the exclusion of any such claims as the plaintiffs may so introduce as additions to those specified in their bill, and which additional claims had been negligently omitted, or improperly withheld.

But in laying down this rule, intended to impose upon a plaintiff an obligation to take seasonable care of all his rights, and to prevent him from vexatiously increasing the expense, and retarding the progress of a suit, instituted for the benefit of others as well as himself, I would not be understood as going so far as to determine, that it should have the effect of depriving him of any other mode of relief to which he may have recourse. Such omitted claim may be founded on a judgment, as in this instance of claim No. 3, or upon a mortgage, in which case, I am not now prepared to say, that its not having been demanded in the bill would have the effect of depriving the claimant of his general or specific lien.

(b) *Strike's case*, 1 Bland, 95.—(c) *Dickenson v. Harrison*, 2 Exch. Rep. 105.
(d) 1785, ch. 80, s. 7; 1802, ch. 101, s. 8; 1798, ch. 101, sub ch: 8, s. 13, 14 and 15.

Whereupon, it is *Ordered*, that the exceptions to the claims Nos. 1, 2 and 5, are hereby overruled; but, that in so far as the said exceptions are directed against claim No. 3, exclusively, they are sustained, and that claim is hereby rejected; but without prejudice. And the auditor, in making a distribution of the trust fund, and of the surplus of that fund, together with the proceeds of the deceased's estate, will be governed by the principles herein before laid down and explained.

After which, some other claims were brought in, among which was one filed on the 11th of June, 1829, by *Joseph N. Stockett*, administrator *de bonis non*, with the will annexed of *John Stockett*, deceased, for the sum of \$300, admitted to be due by the deed of trust, with interest from the 12th of June, 1812. To the allowance of which, the plaintiff *Welch* objected, that it was not proved in the manner required by law, and the practice of the court; and he also plead the act of limitations as a bar; and relied on the lapse of time as evidence of payment.

10th August, 1829.—BLAND, *Chancellor*.—This case having been again brought before the court to obtain an order for a final audit; and the solicitors of the parties having submitted the matter, so far as they were concerned, on notes, the proceedings were read and considered.

The order of the 16th of March last, having made only a partial adjustment of this case preparatory to a final audit, it remains, in connection with that order, to dispose of the residue of the now controverted or neglected claims which have been heretofore introduced into the case.

The claim of *Joseph N. Stockett*, as administrator *de bonis non* of *John Stockett*, deceased, stated in the auditor's report filed on the 4th of February last, as claim No. 7, has been admitted, provided for, and secured by the deed of trust mentioned in the bill; and therefore, must now be permitted to take the grade and stand of preference, allowed to all the other claims coming in under that deed; unless it can be pushed from its position by one or other of the points pressed against it. It is alleged to have been paid. There is, however, no proof of any payment, and therefore, that point must be thrown aside, as having entirely failed for the direct purpose for which it was introduced. But it is said to afford a safe and just means of urging on another point; and that is, the lapse of time as evidence of payment.

The presumption of payment, arising from lapse of time, is a point of defence, which may be pressed with effect, either at law or in equity, where it can be made to bear upon the asserted claim; but, in this instance, the claim is sustained by the deed of trust; and if the lapse of time could have been used at all, as a point of defence, it should have been presented in some form substantially as a plea of limitations; and in that way it has been presented; but it has been offered entirely too late.

The filing of a creditor's bill in England, it is said, enures to the benefit of all creditors who may come in under the decree, so as to take their claims out of the operation of the statute of limitation, from the day of filing the bill. (e) But here no such presumption or fiction has been adopted. As to all creditors coming in after the institution of the suit, or under the decree, the day of filing the petition to be admitted as a creditor, or the day of filing the voucher or evidence of the claim is considered as the commencement of the suit as to such creditor; and as that day on which the further running of the statute of limitations as against his claim is to cease. And where a claim is made in the ordinary mode by bill, and the defendant, by his answer, in any manner contests it, without relying on the statute of limitations, he cannot be permitted to resort to that defence after having thus tacitly waived it.

The principle of this practice is applied wherever it can be brought properly to bear upon the course of proceedings. A creditor who comes, or is brought in, as in this instance, under a creditor's bill, is considered in many respects as a co-plaintiff, from the time his claim has been filed or brought before the court, and all other creditors, as well as the original defendants, with whose interests such claim may come in conflict, may oppose it, in any legal manner they may deem most available. In doing so, the creditor, who, by reason of his claim, has been invited, or summoned to appear before the court, and the party who contests it, assume the relative positions of plaintiff and defendant; or, as they may be called, in contradistinction from the original plaintiff and defendant, that of *claimant* and *opponent*; and as standing in those relative positions, the controversy between them has always been considered. In this view of the matter, it has been long established, that if an *opponent* means so to defend his interests,

(e) *Sterndale v. Hankinson*, 2 Cond. Chan. Rep. 198.

he must put in the plea, or rely upon the statute of limitations in due season; for, if he suffers the proper stage of the case to pass by, or if he himself does, or stands by and suffers an act to be done, which necessarily implies a waiver of that defence on his part, he cannot afterwards have recourse to it. This, however, is to be understood of the proceedings of the parties to the case, and not of the acts of any of the officers of the court. The auditor has always been considered as the mere ministerial officer of the court, whose powers and duties extend no farther than to prepare and put in order the materials upon which the Chancellor is to adjudicate. Hence, no statement, report, or act of the auditor can affect the rights or interests of a party, plaintiff, or defendant, claimant, or opponent. (f)

Upon this ground it has always been held, that the statute of limitations may be presented as a defence, at any time after the claim has been filed or brought before the court, either before the case has gone to the auditor, or after he has made a report on it. (g)

(f) *Dorsey v. Hammond*, 1 Bland, 469; *Fenwick v. Gibbes*, 2 Desau, 635.

(g) *THE STATE v. BROOKES*.—This bill, filed on the 24th of April, 1793, by Luther Martin, the attorney-general on behalf of the state, sets forth, that John Beall was appointed collector of the taxes for Prince George's county, and as such, gave bond with Humphrey Belt and Benjamin Brookes, as his sureties; that Beall having failed to pay over the money he had collected, suits were brought on his bond, and judgment obtained against Benjamin Brookes for a considerable amount, which was then due. That afterwards, Brookes died, having previously, by his will, devised his real estate to his son Robert in tail, remainder to his son Benjamin in tail, subject to a right given to his wife and daughter, as described in the will, of using it and taking a certain portion of the rents and profits thereof; by which will, he appointed his wife Sarah and his brother Henry his executors. The bill further states, that the testator's personal estate was insufficient to pay his debts. Prayer, that the executors might account for the personalty; and that, if it should be insufficient, the real estate might be sold to pay this debt due by the deceased to the state.

The executors and the devisee Robert Brookes, were the only persons made defendants.

9th March, 1796.—HANSON, *Chancellor*.—The claim of the state aforesaid against the deceased, and the insufficiency of the personal estate to discharge it being established to the Chancellor's satisfaction, and it appearing reasonable under all circumstances, that the land in the bill and answers mentioned, which hath been devised by the deceased to the defendant Robert Brookes, be sold for the payment of the just debts of the deceased. *Decreed*, that they be sold, &c. &c. and that the trustee give notice to the creditors of the deceased to bring in their claims, &c.

A sale was accordingly made, and before it was reported, the defendant Sarah petitioned that it might not be ratified; because of the objections therein stated. On the 2d of May, 1796, an order was passed appointing a day for hearing, and allowing the parties to take testimony in the usual manner.

But where, without specially relying on the statute of limitations, a defence was taken against the claim on the 10th of February, 1818, and witnesses were produced and proceedings had; and then on the 10th of December, 1819, a plea of the statute of limitations was filed and relied on. It was held, that the plea was offered too late, and it was accordingly rejected. (*h*)

9th June, 1796.—HANSON, *Chancellor*.—The Chancellor has considered the petition of Sarah Brookes for setting aside the sale, made by the trustee of the real estate of Benjamin Brookes, and the depositions returned, agreeably to the order for that purpose made, and the arguments of the counsel for General Benjamin Brookes.

He finds nothing reprehensible in the conduct of the purchaser; and nothing which can be deemed fraudulent has been proven; but it is clearly established by the depositions, that the sale was affected by suggestions made at the time of the sale, that thereby a person was prevented from bidding, and the land hath been sold for a considerably less price than otherwise it might have commanded. It hath always been a rule with the Chancellor to impress the public with an idea, that no device or contrivance used at a sale, which requires his ratification, shall be of any avail. It is essential to the administration of justice in this court, that this rule be inviolably observed. Where property appears to have been sold under its value, the slightest circumstance of fraud, combination, or management, ought to be deemed sufficient, on the application of a party interested, to set aside the sale. As those things are of a nature to elude detection, where little is proved, a great deal may fairly be presumed. In the present case, indeed, there does not appear to have been any fraud or combination; but if a sale, under such circumstances, should be ratified, the encouragement which the precedent might afford, would probably operate not only against the interest of the parties concerned in sales, but against substantial justice and the reputation of this tribunal.

It is therefore *Ordered*, that the sale made by William Marbury, trustee of the said real estate of Benjamin Brookes deceased to General Benjamin Brookes, as stated in his report, this day returned, be vacated and set aside; and that the bond or bonds taken by the said trustee, on the said sale, be cancelled or delivered up to the said General Brookes; and that the said trustee proceed to sell again the said property on the terms and in the manner prescribed by the original decree in this cause; and that in every thing, except giving a new bond, before, at, and after the sale, he act as by the said decree prescribed.

On the 30th of July, 1796, a new sale having been made and reported, was afterwards absolutely ratified and confirmed.

The auditor, on the 18th of February, 1803, made a report, in which, among other things, he says that Stephen West's claim, account No. 6, commences early in the year 1756, and is continued as an open account until 1776, in which time, and for ten years afterwards, there does not appear to have been any settlement between the parties; and the affidavit of the executrix of Stephen West appears to be defective; in addition to these objections the solicitor for the executrix of Benjamin Brookes has filed exceptions to this claim herewith returned. That Benjamin Oden's claim, account No. 9, is a judgment against the executrix, which has no proof except the transcript of said judgment.

Sarah Brookes, widow of Benjamin Brookes, in behalf of herself and Robert

In this case the *opponent Welch*, by his bill, filed on the 2d of August, 1827, averred that this claim, which he called into court, had been paid; and the *claimant Stockett*, by his answer, filed on the 19th of October, 1827, denied that allegation. The parties were thus at issue upon the fact of payment, which the *opponent* has failed to sustain by any proof whatever. After which, and all the intermediate proceedings in the case, it certainly could not now be in order, or consistent with a well regulated administration of justice to permit this *opponent* to abandon that issue, and so late as the 29th of June last, to make up another issue, and to present a new defence against this claim, founded on the statute of limitations. (i)

Brookes and Sophia Brookes her children, both infants under the age of twenty-one years, objects to the allowance by the auditor of the claim against the said real estate by the executrix of Stephen West, for the following reasons: 1st, it appears that the account commences with a charge of £28 19s. 0d. on the 6th of April, 1756, which note is also exhibited, and is without seal. That although credits are given as far as the year 1776, yet that the account stops there, and no steps appear to have been taken to obtain payment of the balance, if any was due; which from the length of time furnishes a strong presumption that no balance was due; and she pleads and relies on the length of time as a bar to the said claim. 2d. That a suit is now pending in Prince George's county court, against the said Sarah Brookes as executrix of Benjamin Brookes for the same claim, to which she has pleaded the act of limitations, and which has been laid before the auditor, under the act of 1785, ch. 80, and is not yet reported on, which she is ready to make appear; and 3d, That the probate of H. West, the executrix is not sufficient, and not such as the law requires.

27th May, 1803.—HANSON, Chancellor.—Ordered, that the Chancellor, on application, at any time after the first day of October next, will proceed to decide on the claim of Stephen West's executor against Benjamin Brookes deceased; provided a copy of this order be served on Hannah West, or Richard Ridgely, her solicitor, in case she cannot conveniently be therewith served, before the first day of July next. Ordered likewise, that depositions taken before a single magistrate, on two days notice, in case it can conveniently be served, or without notice, in case it cannot be so served, shall be received as evidence on the trial of the said claim.

After which the case was again brought before the court as to other claims.

18th July, 1803.—HANSON, Chancellor.—Let the auditor state the proportions which each creditor of Benjamin Brookes is entitled to of the money arising from the sale of the real estate of said Brookes, deducting the commission of £75, and costs of suit, the state being entitled to a preference. He is to state the proportion of Stephen West, although his claim is disputed; the object of stating the proportions being, that an order may be passed for paying each claimant, except the said West, immediately. The said West's claim is, agreeably to the order of 27th May, 1803, to be decided on after the first day of October next.

Upon the whole, I am of opinion, that the opposition to this claim of *Joseph N. Stockett* as administrator is altogether untenable; and that therefore it must be allowed to take its stand as one of the preferred claims provided for by the deed of trust.

The claims of *Saunders'* representatives, and all others not now authenticated, or admitted according to the course of the court, must be altogether rejected.

Whereupon it is *Ordered*, that this case be, and the same is hereby referred to the auditor, with directions to state an account accordingly.

In obedience to these orders the auditor made a report, which was confirmed on the 14th of August, 1829.

TOWNSHEND v. DUNCAN.

A plaintiff must state in his bill such facts as are necessary to entitle him to relief; and also shew why he may ask that relief of a Court of Equity. Where the case set forth in the bill is such as to entitle the plaintiff to relief, the court may have further inquiries made by the auditor, so as to adapt the relief to the peculiar nature of the case. Where an infant takes as devisee, it is not necessary to charge in the bill that he received the rents and profits; because it is the duty of his guardian to take care of his estate. This court has jurisdiction to decree an account of an annual sum charged upon land. The office, powers, and duties of masters in chancery in England; and of the auditor of this court. Testimony may be taken under an order before a justice of the peace. The probate of a will, in relation to real estate, considered as *prima facie* evidence. A decree against infants for the payment of money.

After which the case was again called up for hearing upon the exceptions.

12th October, 1803.—HANSON, *Chancellor*.—The Chancellor having appointed this day for deciding on the claims of Benjamin Oden, and of Stephen West's executrix against the estate of Benjamin Brookes deceased, and the counsel on each side having submitted the questions without argument, the Chancellor proceeded to examine the papers and vouchers relative to the said claim.

There appears no reason wherefore the Chancellor should differ from the auditor relative to West's claim. It is therefore wholly rejected. As to the claim of Oden, nothing appears wanted except his affidavit. The opposite counsel, however, Mr. William Kilty, being in court, and expressing his approbation of and assent to the said claim; it is allowed to be good. Let the auditor of this court make a statement accordingly of the money reserved on account of the rejected claims.

The auditor afterwards made and reported a statement accordingly, shewing a surplus to be paid to the heirs of Benjamin Brookes, which statement was, on the 21st of October, 1803, approved, and the proceeds directed to be applied accordingly.

THIS bill was filed on the 17th of August, 1826, by *Perry Townshend* and *Anna Maria*, his wife, against *William J. B. Duncan*, *Caroline Duncan*, who are infants, *Joseph Robinson* and *Thomas Iglehart*. The bill states, that *William Duncan* being seized and possessed of a considerable real and personal estate, on the 26th of December, 1818, made his last will, which, so far as concerns the matter in controversy, is as follows :

‘I give and devise unto my daughter *Caroline Duncan*, and my son *William Joseph Bend Duncan*, the plantation whereon I now dwell, consisting of several tracts, or parts of tracts of land, one of which is called and known by the name of Burgess’s Right, and part of a tract in two parcels, called Puddington’s Harbour, otherwise called Puddington’s Gift, being contiguous to each other, and containing, in the whole, two hundred twenty-nine and one-half acres, more or less, to them and their heirs forever, to be equally divided between them, share and share alike as joint tenants, and not as tenants in common. I give and bequeath to my daughter *Anna Maria Duncan*, the sum of sixty dollars, current money, as an annuity, to be paid to her out of the profits of my real estate above mentioned, annually for and during the term of her natural life, withholding from her, however, the power of selling or transferring the above mentioned annual allowance to any person or persons whatever, under penalty of forfeiture. I do hereby constitute and appoint my dear wife *Deborah Duncan*, sole executrix of this my last will.’

The bill further states, that the testator, *William Duncan*, died, on or about the 25th of March, 1819, leaving those children, the plaintiff *Anna Maria*, by a first marriage, and the defendants *William* and *Caroline*, both of whom were then and still are infants, by his wife *Deborah*, the legatees and devisees mentioned in his will ; that the said *Deborah* administered and died ; and that *Thomas Iglehart* took out letters, and was then the administrator *de bonis non* of the deceased ; that the said *Deborah*, before her death, paid the plaintiff *Anna Maria*, one year’s allowance after her father’s death ; and that *Joseph Robinson*, who had been appointed, and then was the guardian of the said infants, had also paid the plaintiff *Anna Maria*, one year’s allowance under the will of her father. But that the defendants had failed and refused to pay any more of the annuity to her, either before or since her intermarriage with the plaintiff *Perry Townshend*.

After which the bill concludes thus ; to the end that justice may

be done them, that an account may be had, that the said land may be sold ; and under the direction of this court, the proceeds thereof applied to the payment of their annuity, with costs of suit ; and the balance so invested as to stand an answerable fund to meet future instalments of said annuity ; or that such other relief may be given to them as to the court may seem meet ; and to the end that answers may be filed to all and singular the premises, to grant subpœnas, &c.

6th October, 1826.—BLAND, *Chancellor*.—The defendants *William J. B. Duncan* and *Caroline Duncan*, and *Joseph Robinson*, having been returned summoned, and not having appeared, or filed their answers within the time allowed by the rules of the court, it is DECREED, that the plaintiffs are entitled to relief, but as it does not appear to what relief they are entitled, it is *Ordered*, that a commission issue to such person as the complainants may name to take testimony to ascertain to what they are entitled. (a)

The plaintiffs, by their petition, stated, that the defendant *Thomas Iglehart*, had died since the commencement of this suit ; and that administration *de bonis non* upon the estate of the testator *William Duncan*, had been granted to *John Iglehart*. Whereupon they prayed that he might be accordingly summoned as a defendant. (b)

8th March, 1827.—BLAND, *Chancellor*.—*Ordered*, that the said *John Iglehart*, be, and he is hereby made a party defendant, as prayed ; and he is hereby directed to be summoned accordingly, to appear on the 10th day of April next ; provided, that the summons be served as the law requires, on or before the twentieth instant.

After which, *John Iglehart* having been summoned, and having failed to appear and answer, a decree was, on the 20th of December, 1827, passed against him similar to that of the 6th of December, 1826. Under which decrees a commission was issued, in execution and return of which, the commissioners said that the solicitor of the plaintiff had produced and filed a certified copy of the last will and testament of *William Duncan*, which together with the commission, he returned and filed, on the 31st of Decem-

(a) It is declared that wherever a subpœna shall be returned summoned, as to all or any of the defendants, making no distinction in favour of *infants*, the court must enter an interlocutory decree, &c. 1820, ch. 161, s. 1.—(b) 1820, ch. 161, s. 5.

ber, 1827. No other testimony was taken or returned with that commission.

On the 24th of January, 1828, the infant defendants put in their answer, by their guardian *ad litem*, in which they said, that they knew nothing of the contents of the bill; nor could they admit them; but prayed that they might be proved, and that their interests might be protected.

21st February, 1828.—BLAND, *Chancellor*.—This case standing ready for hearing, and having been submitted, the proceedings were read and considered.

The law of a case arises out of the facts of which it is constituted, and it is the duty of the court to declare what that law is. It is therefore not only unnecessary, but, in some cases it may be deemed impertinent, in a suitor to set forth, and comment upon what he conceives to be the law arising out of his case. To do so, without stating all the facts, or upon an imperfect statement of facts; as for example, to charge a defendant with fraud, without stating any such facts, as in contemplation of law, constitute a fraud, can form no foundation for relief or defence. It is sufficient that each party should state the facts of his own case; and therefore, although it is not unusual for a plaintiff to state in his bill, by way of anticipation, some of the allegations and pretences of the defendant; it is not indispensably necessary, in any case, or even proper in all cases, to set forth any matter in the bill, which if brought out at all, should come from the defendant as constituting a part or the entire foundation of his defence. But, it is essential that the plaintiff should distinctly state every fact necessary to constitute such a case as gives him a right to claim relief from the defendant at the time of filing his bill; and moreover, to set forth those peculiar circumstances which justify him in passing by the ordinary tribunals of the common law, and coming into a Court of Equity to seek that relief. The plaintiff may state his case in the alternative, or with a double aspect, so that it may be considered in one way, or in another; provided, that in whatever way it is presented, it falls properly within the cognizance of a Court of Equity. Upon a case, so stated, the plaintiff may either pray for special or for general relief; or he may make both special and general prayers for relief. And where the nature of the case is such, that the special prayer or designated relief cannot be granted; then, under the general prayer, relief may be granted, suitable to the peculiar nature of the case; as to which the court

is not confined to that which may be specially asked or suggested, orally or otherwise; but may adapt the relief exactly to the nature of the case stated in the bill, regardless of any thing that may be said to the contrary by any of the parties. But if there be no general prayer, and the special prayer cannot be granted, the plaintiff must amend his bill or have it dismissed. (c)

Before a decree can be so correctly framed as to suit the peculiar nature of the case now under consideration, the court must be furnished with some further information, and with some statements by way of illustration of the bearings of the allegations of the bill. But no case can be sent to the auditor for any such purposes, where there is no ground for relief shewn by the pleadings, or where the facts as stated in the bill, do not, of themselves, exhibit a sufficient foundation for some relief, either under the special or the general prayer. (d) It will therefore be necessary to see whether these plaintiffs have stated such facts as constitute a case that entitles them to relief; and also to consider what are the powers and duties of the auditor to collect information, and make statements in cases of this kind.

The facts of which the plaintiffs have constituted their case, are these: *William Duncan*, being seized and possessed, in fee simple, of a parcel of land, containing two hundred and twenty-nine acres and a half, by his last will devised it to his two infant children, the defendants *William* and *Caroline*, and their heirs forever as joint tenants; and to his daughter *Anna Maria*, now the wife of the plaintiff *Perry Townshend*, he bequeathed an annuity of sixty dollars, to be paid to her out of the rents and profits of his real estate above mentioned, annually during her life; and appointed his wife *Deborah*, the mother of the defendants *William* and *Caroline*, his executrix; that the testator died in March, 1819; and the executrix *Deborah*, administered upon his estate, and paid to the plaintiff *Anna Maria*, her annuity for one year; after which the executrix *Deborah* died, and administration *de bonis non* was thereupon granted to *Thomas Iglehart*; that the defendant *Robin-*

(c) *Chicot v. Lequesne*, 2 Ves. 318; *East India Company v. Henchman*, 1 Ves. jur. 289; *Wheeler v. Trotter*, 3 Swan, 174, n.; *Gordon v. Gordon*, 3 Swan, 472; *Barfield v. Kelly*, 3 Cond. Chan. Rep. 703; *Topham v Constantine*, 5 Cond. Chan. Rep. 322; *Brice v. Bletchley*, 6 Mad. 17; *Edney v. Jewell*, 6 Mad. 165; *Cuthbert v. Creasy*, 6 Mad. 189; *Flint v. Field*, 2 Antr. 543; *Hall v. Maltby*, 2 Exche. Rep. 463; *Carew v. Johnston*, 2 Scho. and Lefr. 280; *Lingan v. Henderson*, 1 Bland, 236.
 (d) *Holloway v. Mellard*, 1 Mad. Rep. 421, (229.)

son, who is the guardian of the infant defendants *William* and *Caroline*, had also paid to the plaintiff *Anna Maria*, her annuity for one year, under the will of her father. But, that those defendants have failed and refused to pay any more of the annuity to her, either before, or since her intermarriage; and that the defendant *Thomas Iglehart* having died since the filing of the bill, and administration *de bonis non* having been granted to *John Iglehart*, he had been summoned as a defendant, and the suit had been revived against him accordingly.

Upon these facts the plaintiffs have prayed for an account; that the land might be sold; and that the proceeds thereof might be applied to the payment of their annuity with costs, and the balance so invested as to stand as an available fund to meet future instalments of said annuity; or, that such other relief might be given to them as to the court might seem meet.

It will be seen by adverting to the will of *William Duncan* deceased, that he has expressly declared, that the annuity should be paid out of the rents and profits of the estate; thus unequivocally shewing it to have been his intention, that it should be charged altogether and exclusively upon that estate; and that his personalty should be in no way liable (*e*)—consequently, it could not have been necessary for the plaintiffs to say any thing of the deceased's personal estate; or to have made his executrix or administrator a party to this suit.

The subject claimed by these plaintiffs is an annuity charged upon, and payable out of the rents and profits of a certain real estate; which real estate, so charged, was devised to these infant defendants *William* and *Caroline*. These facts are sufficiently stated in the bill, and are more fully shewn by the last will of the testator, which is exhibited as a part of it. The bill further states, that after the death of the testator, *Deborah*, who was the mother of the infant defendants *William* and *Caroline*, paid the plaintiff *Anna Maria* one year's annuity; and that the defendant *Robinson*, who is their guardian, also paid the plaintiff *Anna Maria* one year's annuity, under her father's will. Here then is a sufficient statement of the fact, that these infant defendants, by their mother, and afterwards by their legal guardian, took the real estate so devised to them; and actually, in consequence thereof, paid a part of the annuity so charged upon it.

(*e*) *Elliot v. Hancock*, 2 Vern. 143; *Attorney-General v. Downing*, Amb. 571.

The bill, it is true, does not allege that the devisees, or their guardian, received the rents and profits of the land charged with the payment of the annuity. But no such allegation by the plaintiffs was necessary; since it was enough for them to have shewn, that the devisees actually took the estate as devised. If they derived no profit from it, it was their own fault; and a matter with which the plaintiffs could have no concern. If the estate charged was wholly insufficient to pay the annuity, they should have disclaimed all right to it; or the fact should have been, in some way, put upon the record by the defendants; which has not been done. But, according to the common law, the mother, as guardian, has an interest in, and is bound to take charge of her wards' estate. (*f*) And by the common law, as well as by positive legislative enactment, a guardian of an infant is bound immediately to take possession of his ward's real and personal estate; to manage it to the best advantage; and to account for its rents and profits. (*g*) It could not, therefore, be necessary for these plaintiffs to aver, as a foundation of their claim to relief, that the guardians of these infant devisees had received the rents and profits of their estate; or, in other words, that they had performed their legal duty; since that must be presumed; and a guardian himself surely could not be permitted to rely upon the fact of his own negligence for his own benefit. (*h*)

(*f*) *Ratcliff's case*, 3 Co. 38; *Roach v. Garvan*, 1 Ves. 158; *Mellish v. De Costa*, 2 Atk. 14; *Smith v. Marshall*, 2 Atk. 70; *The King v. Oakley*, 10 East. 494; 2 Fonb. 238; 1 Blac. Com. 461.—(*g*) Co. Litt. 88; 2 Fonb. 243; *Hay v. Conner*, 2 H. & J. 347; *Brodess v. Thompson*, 2 H. & G. 120; 1798, ch. 101, Sub. Ch. 12; (*h*) *Gregory v. Mighell*, 18 Ves. 331; *Parker v. Mackall*, pos. note.

COX v. CALLAHAN.—This bill was filed on the 15th of December, 1790—It states that the plaintiff, while an infant, became seized of a certain tract of land as devisee of his late father; that his mother was entitled to dower therein; that she married John Railey, who afterwards became the guardian of the plaintiff; that Railey held the land to which the plaintiff was entitled, and took the rents and profits, but never paid or accounted for them; that he made his will, and appointed the defendant Chaires his executor, who received the then crop of the plaintiff's land; that the lands of which John Railey died seized, descended to his heir Charles Railey, who devised them in part to the defendant Benton, and in remainder and wholly to the defendant Callahan, whom he appointed his executors and died; that John Railey's personal estate was insufficient to pay his debts; and that neither he, in his lifetime, nor any of the defendants since, have paid or accounted to the plaintiff for the rents and profits of his lands. Prayer for an account, and for general relief.

The defendants answered, proofs were taken, and the case was thereupon brought before the court.

25th January, 1793.—*HANSON, Chancellor*.—This cause standing ready for hearing, and being submitted to the Chancellor without argument, the bill, answers,

But the plaintiffs are here asking a Court of Equity to enforce the payment of this annuity—an annuity, given by a will, is, for

depositions, exhibits and other proceedings were by him read and carefully considered. And the matters stated in the bill appearing to him to be true; and he thereon being of opinion, that the complainant is entitled to an account of the profits of his real estate, whilst in the hands of his guardian John Railey, notwithstanding the valuation thereof by appraisers, and to an account also of the profits, whilst the said estate was in the hands of the said Railey's executors; and that the amount of the said profits, after deducting the expenses of maintaining and educating the complainant, and the taxes and other just charges, if any, on the land aforesaid, together with interest on the balance from the time of the complainant's arrival at full age, ought to be paid to him, out of the personal estate of the said Railey, or if that estate be insufficient, out of the real estate which hath descended from the said Railey.

It is thereupon *Decreed*, that the defendant John Chaires do, on oath, account with the complainant for two-thirds of the profits of that part, containing three hundred and seventy-five acres of a tract of land, called Low's Arcadia, which was devised by Christopher Cox, father of the complainant, from the 27th day of September, 1781, and for the whole of the said profits from the 7th day of February, 1785, until the end of the year 1786, deducting thence all sums expended by the said Railey in the maintenance, support and education of the complainant: and his proportionable part of all taxes paid for the said land whilst in the possession of the said Railey, or his executor; and also for interest on the balance from the 2d day of September, 1787, that being the day whereon the complainant attained his full age as aforesaid.

And it is further *Decreed*, that the auditor state the said account, and that, in so doing, he state the yearly value of the land to be so much as it is proved the said Railey rented out the same for during one year, deducting a reasonable allowance for the articles belonging to the said Railey, which were let to the tenant along with the land; and that the auditor likewise take an account of the personal estate of the said John Railey, or assets which have come to the hands of the said John Chaires, and the disbursements of the said Chaires, as executor of the said Railey; and that the auditor report the said accounts, subject to the exceptions of the parties, and to be done with as to the Chancellor shall seem just and proper.

The auditor made a report accordingly, by which it appeared, that the executor Chaires had overpaid, and that the personal estate of John Railey deceased, was exhausted. Upon which the case was again brought before the court.

20th December, 1793.—HANSON, *Chancellor*.—On motion of the complainant it is *Ordered*, that the report of the auditor, and the account by him stated, agreeably to the interlocutory decree, be taken and considered as a ground for the relief prayed, and for making the lands which have descended from the said Railey, and which are in the hands of the defendant Thomas Callahan, answerable for the deficiency of the personal estate of the said Railey; unless the contrary be shewn by the said Callahan on or before the first Tuesday in February next; provided a copy of this order be served on the said Callahan before the twenty-fifth day of January next.

A copy of this order having been served as required, and no sufficient cause having been shewn, the case was submitted, without argument, for a final decree.

23d June, 1794.—HANSON, *Chancellor*.—The said cause standing ready for final decision, and being submitted, and the bill, answer, exhibits, auditor's report, and all other proceedings being by the Chancellor read and considered:

many purposes treated as a legacy, and so considered, its payment may certainly be enforced in equity. (i) These plaintiffs could not proceed for the recovery of this annual sum, at common law, as for a rent charge; because no right of distress is given by the grantor, and it is not distrainable of common right: nor could they enter upon and hold the land charged until they were satisfied; because the testator has given them no such authority. A writ of annuity, being a remedy at law against the person of the grantor of the annuity, it follows, that a devisee could not avail himself of it, as the devisor ceased to exist before the gift of the annuity took effect. (j) The annual sum thus devised to the plaintiff *Anna Maria*, being made payable out of the land, might, however, be regarded as a rent seck; and as such, having been made distrainable by statute, it might be held, that the plaintiff should, in that way, obtain relief at law. (k) Or these plaintiffs might, with better apparent hope of success, bring a special action upon the case, the most flexible and comprehensive form of action known to the common law; yet the embarrassments and inconveniences of applying even that form of proceeding to the purposes of obtaining relief, in a case like this, are obvious, and would be very great. Before the statute which gave the power to distrain for rent seck, the payment of such rents might be enforced in equity; and even since, relief has been granted, in cases of rent charge, with an admitted power of distress and re-entry. The remedy in equity is manifestly more convenient and effectual,

It is thereupon *Decreed*, that unless the defendant Thomas Callahan shall pay unto the complainant Christopher Cox the sums stated by the auditor to be to him due, amounting to £282 19s. 0d. current money, with interest thereon from the 22d of March, 1787, the several tracts of land called Good Increase, Railey's Hazard, Railey's Chance, and part of a tract of land called Shetland, supposed to lie in Queen Ann county, or such of them as descended from the aforesaid John Railey unto Charles Railey, and have, by the said Charles Railey, been devised unto the defendant Thomas Callahan, shall be assets in the hands of the said Callahan, and shall be subject to execution from this court for the payment of the said sum, with interest as aforesaid from the 22d day of March, 1787. And also for the payment of the legal costs expended by the complainant in the prosecution of this suit, amounting, as taxed by the register, to the quantity of 5201 pounds of tobacco. And it is further *Decreed*, that the defendants John Chaires and Mark Benton be hence dismissed.

(i) *Attorney-General v. Downing*, 1 Dick. 417; *Nannock v. Horton*, 7 Ves. 402; *Sibley v. Perry*, 7 Ves. 534.—(j) *William Clun's case*, 10 Co. 128; Co. Litt. 144; *Brediman's case*, 6 Co. 59.—(k) Co. Litt. 143; *Brediman's case*, 6 Co. 59; *Saward v. Anstey*, 9 Com. Law Rep. 506; *Rebecca Owings' case*, 1 Bland, 296.

safer and better. It may be found to be least injurious to the interest of these infants, and without disadvantage to any one else, to have the land sold for the payment of this annuity; or it may be deemed necessary to have it raised out of the rents and profits by putting a receiver upon the estate, which could not be done by a court of common law, (*l*) or there may be a personal decree against them, or their guardian, in respect to the amount of the rents and profits received by them. (*m*) It is therefore clear, that these plaintiffs have sufficiently set forth such a combination of facts, as shews that they have a just claim to relief; and that they may, with propriety, ask that relief of a Court of Equity. (*n*)

It appearing then, that these plaintiffs have just grounds to ask relief of this court; and that, therefore, the case may be referred to the auditor, for any purpose falling within the scope of its duty; the next inquiry is, as to the mode in which they should be relieved. In making this inquiry, it must be recollected, that this is a case of provisions for children, which admits, perhaps, of a greater variety of determinations, and of judgment on circumstances, than any other kind of case, that can be brought before a Court of Equity; (*o*) and that the relief, whatever may be its form, is to be granted against infants; for the protection of whose interests the court is in the habit of proceeding guardedly and with caution. (*p*) It will therefore be proper to make some inquiry into the particulars and details of this case, that the court may be enabled, properly to exercise its greater latitude of determination, for the benefit of all these children, and with the least disadvantage to the interests of these infants.

It may be, that this real estate is, in truth, of much less, or of no greater value than the annuity with which it is charged. In that case, it would be thus shewn to have been the intention of the testator, who must have known the value of his estate, to give to the plaintiff, *Anna Maria*, a life interest in it; or that, whatever might have been his intention, his express direction would be

(*l*) *Thorndike v. Allington*, 1 Chan. Ca. 79; *Davy v. Davy*, 1 Chan. Ca. 147; *Kennoule v. Bedford*, 1 Chan. Ca. 295; *Bath and Mountague's case*, 3 Chan. Ca. 91; *Sherman v. Collins*, 3 Atk. 319; *Nicholls v. Leeson*, 3 Atk. 574; *Leeds v. New Radnor*, 2 Bro. C. C. 339 and 519; *Cupit v. Jackson*, 6 Exch. Rep. 245.—(*m*) *Thorndike v. Allington*, 1 Chan. Ca. 79; *Elliot v. Hancock*, 2 Vern. 143.—(*n*) *Com. Dig. Lit. Chancery*, 3 R. 3.—(*o*) *Teynham v. Webb*, 2 Ves. 206.—(*p*) *Stapilton v. Stapilton*, 1 Atk. 6; *De Manneville v. De Manneville*, 10 Ves. 59; *Still v. Hoste*, 6 Mad. 192.

carried into effect, most beneficially for all concerned, by a sale. But if, on the other hand, it should appear, that the annual value of the land was greatly more than sufficient to pay the annuity, then it may fairly be inferred, that the testator could not have intended, that the estate should be sold; but as the annuity might, so it should, as expressly directed, be raised out of the rents and profits. (q) In order to form a correct opinion as to those matters, an inquiry must be made, and the court must be informed, as to the value of the land; the amount of its annual value; of its rents and profits; and also of the age and health of the annuitant, so as to enable it to put a present value upon the annuity, compared with the land upon which it is charged. And as there may be a personal decree, in respect to the amount of the rents and profits actually received, or which might, and ought to have been received by some of these defendants, it will be proper to have an inquiry made, and information laid before the court as to those matters also.

The mode of making such inquiries, and of obtaining information, in cases like this, by a reference to a master, is common and well settled in England; but here, as this court has now no officer belonging to it denominated, a *Master in Chancery*, I deem it proper in this, the first case of the kind which has been brought before me, to take such a comprehensive view of the office of the auditor, as may enable me to see how far the powers and duties of a master in chancery in England, in making all such special investigations, have devolved or been conferred upon the auditor here, in addition to those with which he has been expressly clothed by the act of assembly under which he is appointed. (r)

In England, the officers called masters in chancery, are assistants and associates to the Chancellor; and two of them at a time, by turns, usually sit with him in court. They have the power to administer oaths, take affidavits, and acknowledgments of deeds, recognizances, &c. (s) It is the duty of a master to execute the orders of the court upon references made to him by it, acting, either in exercise of its original jurisdiction, or under the authority of any act of parliament. The heads of reference that may be made to a master, are almost as numerous as the matters subject to the jurisdiction of the court. For example, a case may be

(q) *Ivy v. Gibert*, 2 P. Will. 19; *Colpoys v. Colpoys*, 4 Cond. Chan. Rep. 210.
(r) 1735, ch. 72, s. 17.—(s) 1 Harri. Prac. Chan. 73.

referred to a master to take accounts between parties of every description; to inquire into the claims of creditors, legatees, and next of kin; to inquire into repairs to be done; to inquire and state what would be a sufficient allowance for the maintenance and education of an infant, or for the maintenance of any one, the amount of which, as claimed, was left uncertain; (*t*) to inquire into the value of an estate for the purpose of enabling a party to elect, to assist the court in fixing upon a price, or in making an investment; (*u*) to inquire whether it would be most for the benefit of an infant, or *feme covert* to take under a will, or against it; (*w*) or to inquire into the value of an annuity, and of the estate upon which it is charged. (*x*) Where the plaintiff's claim was founded on a variety of deeds, wills and other instruments, the general purport only of which was stated in the bill, it was referred to a master to state a case of the rights claimed by the plaintiff under those instruments; (*y*) and so too, where the bill had not minutely charged every particular circumstance, which, as matters of evidence, it would not have been proper to charge, and yet it appeared, that the case turned upon it, and no notice or opportunity had been given to the other side to answer it, the case was referred to a master to make inquiry and report such particulars. (*z*) And the court is much in the habit of directing inquiries with respect to material points, in order to supply the defect of proofs in the case, where a sufficient ground has been shown of the propriety of such inquiry. (*a*)

In general, there is no question of law or equity, or disputed fact, respecting which, a master may not be called upon to make a report; (*b*) and in order to enable him to do so, the parties should lay before him a statement of facts; (*c*) and he may call for proofs, and himself examine witnesses on oath. (*d*) But although such examinations, before a master himself, are made privately; no publication passes, as of depositions taken before commissioners. (*e*) If proof be wanted, and the master so certifies, a commission

(*t*) *Abraham v. Alman*, 1 Russ. 509.—(*u*) *Wilson v. Mount*, 3 Ves. 191; *Radnor v. Shafto*, 11 Ves. 454.—(*w*) *Wilson v. Townshend*, 2 Ves. jun. 696; *Ebrington v. Ebrington*, 5 Mad. 117; *Gretton v. Haward*, 1 Swan. 413.—(*x*) *Jones v. Collier*, Amb. 731.—(*y*) *Pauncefort v. Lincoln*, 1 Dick. 362.—(*z*) *Chicot v. Lequesne*, 2 Ves. 318; *Edney v. Jewell*, 6 Mad. 165.—(*a*) *Parkinson v. Ingram*, 3 Ves. 605.—(*b*) *Pottinger v. Wightman*, 3 Meriv. 68; *Toosey v. Burchell*, 4 Cond. Chan. Rep. 73; *Brown v. De Tastet*, 4 Cond. Chan. Rep. 135; *Cook v. Collingridge*, 4 Cond. Chan. Rep. 286.—(*c*) 1 Newl. Pra. 330.—(*d*) *Beam's Ord.* 285.—(*e*) *Parkinson v. Ingram*, 3 Ves. 603; *Forum Rom.* 109.

may be issued as of course; or the proofs may be taken before an examiner, which are returned, and an order of publication passes, as in all other cases. (*f*) The report of a master ought to be without any unnecessary recitals, as succinct as may be; and confined to that which has been referred to him; for as to all else, it may be treated as a nullity; and it should reserve the matter clearly for the judgment of the Chancellor, who alone is the judge. (*g*) But if a master conceives it to be proper, under the peculiar circumstances of the case, to make a special report, in doing so, he is not to set forth the evidence, with his opinion upon it; but only the bare facts for the opinion of the court, in the same manner as in a special verdict, (*h*) unless he should be specially directed to give his reasons. (*i*) But under a decree for an account, he may, if he thinks proper, state special matter, although he has no direction for that purpose. (*j*) If, however, a master is directed to ascertain a particular fact, he ought himself to draw the conclusion from the evidence before him, and not merely to state the circumstances. (*k*)

Besides these masters in chancery, there are other standing officers of the Court of Chancery of England, whose duties are, in some respects, similar to those of masters, called Examiners, who are appointed by the master of the rolls. The office of the examiners is to examine, upon oath, the witnesses on both sides, that are brought before them in any case, as also parties in contempt; and to put their answers and depositions in writing; which they are to keep close and private until publication. But if the witnesses reside more than twenty miles from the place where the court is held, then a commission issues to certain commissioners, nominated by the parties, who are authorized and directed, to take the depositions of such witnesses in private; which are returned and kept secret, until an order of publication is passed. The examination of witnesses was originally in chancery before the master of the rolls, who was one of the judges of the court; and therefore, such examinations now by a master, by an examiner, or by commissioners, must be considered as a delegation, by the court, of a part of its authority to them. (*l*)

(*f*) Beam. Ord. 220.—(*g*) *Dick v. Milligan*, 2 Ves. jun. 24; *Jenkins v. Briant*, 9 Cond. Chan. Rep. 427.—(*h*) *Marlborough v. Wheat*, 1 Atk. 454.—(*i*) *Cook v. Collingridge*, 4 Cond. Chan. Rep. 293;—(*j*) *Anon.* 2 Atk. 621.—(*k*) *Lee v. Willock*, 6 Ves. 605.—(*l*) *Forum Rom*, 124; 1 Harr. Prac. Chan. 430, 482.

Considering the nature of the office and duty of a master in chancery, and recollecting, that the practice and course of proceeding of the Court of Chancery of England, had been generally adopted and followed by the Court of Chancery of Maryland, (*m*) it could not be deemed altogether unsafe, at once, to assume, that all the powers and duties of a master in chancery in England, so far as they were, in any way, subservient to the proper exercise of this court's jurisdiction, as a Court of Equity, had devolved upon, and did now, in fact, belong to the auditor of this court. For, whatever may be his appellation or denomination, it is obvious, that the assistance of an officer, invested with authority to collect testimony, to make investigations, calculations, and statements of accounts, and to put in order the various materials, of which complex cases in equity are composed, is as indispensably necessary to the cheap and expeditious administration of justice by a Court of Chancery, as that of an examiner, or of commissioners clothed with no other authority, than that of taking and returning the depositions of witnesses.

It appears, that until some time after the year 1699, when the seat of government was removed to Annapolis, the High Court of Chancery, which was directed to be held at the same place, (*n*) was constituted of a plurality of judges; most or all of whom, certainly the Chancellor, were members of the Court of Appeals, the tribunal of the last resort of the province, (*o*) and consequently as the two courts could not well be in session at the same time, the same room, in the Staté House, was appropriated, by the legislature, to the use of both courts, (*p*) which general arrangement, as to the apartment in the public buildings appropriated to their use, after they were brought to Annapolis, was continued, and has by usage been kept up ever since; (*q*) although, by the Constitu-

(*m*) Ringgold's Case, 1 Bland. 18; 2 Bozm. Hist. Md. 131.—(*n*) 1699 ch. 19.

(*o*) The Chancellor's Case, 1 Bland. 624. 'At a court held for the *chancery* and *provincial court*, begun on Tuesday, the 30th day of December, in the 39th year of the dominion of Cæcilius, absolute lord and proprietary of the province of Maryland and Avalon, &c. annoque Dom. 1670, and continued till the 17th, was present: the Right Hon. Charles Calvert, esq. lieutenant-general and chief judge in equity; the Hon. Phillip Calvert, esq. Chancellor; William Talbot, esq. secretary; William Calvert, Baker Brooks, Thomas Trueman, and Samuel Chew, esq's. This day the Hon. William Talbot, esq. principal secretary, was sworn one of the justices of the provincial court and chancery, and took his place as secretary, next the Chancellor. Upon the 15th day, Edward Fitzherbert, esq. was sworn one of the justices of the provincial court and chancery likewise, and took his place accordingly.' *Chancery Proceedings*, lib. C. D. 26.—(*p*) 1697, ch. 6, s. 3.—(*q*) Resolution, 1836, No 60.

tion of the state, the two tribunals have been organized as totally distinct courts. While the Court of Chancery, under the provincial government was constituted of a plurality of judges, it transacted business only from term to term, and was not always open, as it now is. (r) About, or soon after the year 1714, the constitution of the court seems to have undergone some changes, of which there is no clear or satisfactory explanation to be found among its own records, or in the legislative enactments of the times. But some short time after the year 1719, it seems to have been finally settled, that the High Court of Chancery of Maryland, like that of England, should be considered as always open. (s)

It appears, that there were a number of officers called assistants, masters in chancery, examiners or auditors, appointed to assist the court in the discharge of its various functions. And, for some time, two of those masters were appointed, as in England, to sit, by turns, in court with the Chancellor as his assistants, during each term. (t) But, as it is said, in a case brought before the court, when the Chancellor was sitting with two of those assistants, that he had then no lawyers to aid him with their advice: it would seem, that those assistants or masters in chancery, were mere clerks; or persons unlearned in the law, as a profession, and whose knowledge extended to nothing more than to matters of practice, connected with the ministerial affairs of the court. (u) In

(r) Chancellor's Case. 1 Bland. 624.—(s) Chancellor's Case, 1 Bland, 624.

(t) '19th January, 1715.—Then his Excellency the Governor proceeded to settle and appoint the times for the sitting of the Chancery Court, as follows, viz: March the 10th, when Col. Coursey and Esquire Hall are appointed to sit as assistants. May the 18th when Col. Lloyd and Col. Greenfield are appointed assistants. September the 1st, Col. Tilghman and Esquire Dorsey appointed assistants. December the 1st, Col. Young and Col. Addison assistants. And ordered that the said gentlemen have a month's notice given them before it be their turn to sit at the several courts as above appointed.'—*Chancery Proceedings*, lib. P. L. fol. 85.

GRIFFITH v. VERNON, 1716.—In this cause the report of the *auditor* is approved of, and *Decreed*, that the defendant account and pay to the complainants their just proportions of the sum found in arrear, with costs; and as to the mesne profits, he is referred to his proper remedy; and that the amendment in the former decree be to those of whom it of right belongs by the deceased Lewis Evan's will.—*Chancery Proceedings*, lib. P. L. fol. 291.

(u) BIRCHFIELD v. MILLER.—September 3, 1717.—JOHN HART, *Chancellor*.—William Holland and Samuel Young, assistants. The Governor and Keeper of the Great Seal declares, that being doubtful of his own judgment in determining the point of law now in debate between the complainant and defendant, and having no lawyers to aid him with their advice, but what are already concerned in this cause, he humbly desires the opinion of some of his majesty's judges in the courts

one of the record books of chancery proceedings, it is set forth, that, at a Court of Chancery held at the city of Annapolis, on the 18th day of July, 1721, there was present: 'His Honor, William Holland, esq., Chancellor, who ordered the docket of causes to be called over, which was accordingly done;' taking no notice in that, or in any subsequent record, of there being present at that, or any other term thereafter, any other judge or assistant sitting with the Chancellor. (w) From which it appears, that the court, about that time, ceased to be constituted of a plurality of judges; that masters or assistants, as in England, never thereafter sat in court with the Chancellor; and that, from that time, the High Court of Chancery of Maryland has always been, as it is at present, constituted of the Chancellor alone, as its sole judge.

In England, a master in chancery, and an examiner, are distinct officers; but it appears, that here, the powers and duties of the two offices were, by a commission from the Chancellor, conferred upon the same person, who was expressly invested with all powers and authorities, practised or exercised by any such officer of the Court of Chancery of England. (x) Exceptions to the sufficiency of the

of Westminster, or any two persons learned in the laws of Great Britain; and that the aforesaid opinion be procured and returned in some convenient time.—*Chancery Proceedings*. lib. P. L. fol. 387-394. Answers were accordingly obtained from the Attorney-General of England.—*Ibid.* fol. 418.

(w) *Chancery Proceedings*, lib. P. L. fol. 650-690-720.

(x) 'Maryland, ss. Samuel Ogle, Esquire, Chancellor of the province of Maryland,

To Benjamin Young, of the city of Annapolis, gentleman, *Greeting* :

'Having special trust and confidence in your fidelity, integrity, knowledge and circumspection, I do hereby nominate, constitute and appoint you, the said Benjamin Young, to be examiner and master in the High Court of Chancery, to take the examinations and depositions of witnesses, as to the facts in issue in all causes depending, or hereafter to be commenced in the said court; and also to take all accounts decreed; to report all matters of fact referred to you; and to take all affidavits, and probats of answers in the same court.—Hereby giving and granting unto you, full power and authority to act, do, perform and execute all and singular the powers and authorities as are practiced or exercised by any such officer of the Court of Chancery of England, so far, as in the judgment of the Chancellor, for the time being, the circumstances of the Court of Chancery of this province will admit; and to ask, demand and receive all such fees, perquisites and rewards as shall be by the Lieutenant Governor of the said province, for the time being, thought just and reasonable.—To have and to hold the said office of examiner and master during pleasure. Given at the city of Annapolis, this 8th day of October, in the 21st year of his lordship's dominion, &c. Anno Domini 1734.'

'11th October, 1734—*Sedente Curia*—*Ordered*, that the following oath be taken by Benjamin Young, Esq. as master and examiner in this court; and that the said oath be entered among the records of this court, as the oath of office of master and examiner for the future.'

answer of a defendant might, as at present, be at once brought before the Chancellor; but they were formerly most usually, as in England, referred to a master, or to a person specially authorized to act as such. (y) The depositions of witnesses might be taken before a master or examiner, (z) or the case might be referred to a

‘You shall swear, that well and truly you shall execute the office of master in chancery to which you are called; you shall also well and truly, after your cunning and learning, execute the office of examiner in the Court of Chancery whereunto you are admitted; and you shall duly, justly, and equally examine the causes, that shall be committed unto you, without any favour, or corruption of any person or persons to be had or done, otherwise than of right shall appertain concerning the same; and you shall be attendant to further the same causes, from time to time, as need shall require; and you shall not publish, or shew the same depositions to any person before publication in the court, without the warrant of the same court—so help you God.’

‘Fees settled and allowed by his excellency, Samuel Ogle, Esq. Chancellor, to Benjamin Young, Esq. master and examiner in this court, and to all succeeding masters—for every oath to an affidavit, or probate of an answer, one shilling—for every oath administered to any witness examined by him, one shilling—for every examination of a witness, and report made on any matter referred to him, and returned; for every side, computing seven words in a line, and twelve lines in a side, one shilling and four pence—for every day on which he shall be attended, and proceed in the settling any matter of account referred to be taken by him, ten shillings.’—*Chancery Proceedings*, lib. J. R. No. 2. fol. 625, 633.

(y) *MURDOCK v. HADDOCK*—1713—*Ordered*, that replication or exceptions be filed by next court.—1714—Exceptions to the answer referred, to be argued before Col. Young to make his report.—16th December, 1714—*Ordered*, that Mr. James Haddock’s answer to the interrogatories to him put concerning Thomas Coutts, Patrick Andrews, and others, be referred to Col. Samuel Young, master in chancery, for hearing.

October, 1716.—*HART, Chancellor*.—Upon reading the answer and exceptions taken thereto; and upon hearing this cause, *Ordered*, that the first and second articles relating to that part of the answer be amended; and the third exception agreed, and the answer to be amended in that particular. And *Ordered*, that the defendant pay to the plaintiffs six hundred pounds of tobacco, being the costs for the delay, awarded them.’—*Chancery Proceedings*, lib. P. L. fol. 13, 70, 86, 318.

‘Present, his excellency, the keeper of the great seal of Maryland.

14th July, 1716.—By the Court of Chancery.—Upon the motion of Samuel Young, Esq. one of the assistants in this court, that many references are made to him; and especially of exceptions taken to answers, and other proceedings in this court, which, in obedience to the court, he is obliged to expedite, and hear, and report; although there is no settled fee, or other reward allowed and ascertained to him for such services. It is *Ordered* and ruled by this court, that the said master-assistant, or other gentleman, acting as such on those occasions, and to whom such references are made, be paid and satisfied, either by the complainant or defendant, in whose favour the said referee’s report shall happen to be made, the sum of twenty shillings current money, for such report, before he or they be obliged to make and give in his or their report.’—*Chancery Proceedings*, lib. P. L. fol. 302.

(z) ‘May, 1735.—Ruled and ordered, that in all causes now depending, wherein commissions have issued, but are not returned, the examinations may be taken by

master to examine evidences more fully to illustrate its nature, or to supply some defect in the proofs. (a) A case might be referred to a master to state any account between the parties, or to make any inquiry or statement, deemed necessary by the court, in relation to which he was authorized, as in England, to call before him and examine witnesses upon oath; a case might be referred by a special order to persons therein named, as a kind of special masters, who were thereby virtually clothed with the authority of a master. (b) But owing, as it would seem, to the generally

the examiner and master of this court, as well as in causes wherein no commissions have issued, saving to the parties, in all cases, the liberty of examining any witness or witnesses, who, by reason of age or infirmity cannot attend the examiner, in order to be examined, as if this rule had not been made.'

'October, 1735.—Ruled and ordered, that in all causes which are now, and shall be hereafter referred to the examiner for the examination of witnesses; publication of the depositions do pass, within six months from the court wherein such reference is made; unless an order be made for enlarging publication to any particular time; and if no depositions be taken on either side within the six months, then hearing to be on bill and answer the next court after.'—*Chancery Proceedings*, lib. J. R. No. 2, fol. 649, 681.

(a) *The PROPRIETARY v. BORDLEY*.—December, 1735.—Information, Hammond's plea, demurrer and answer; Jening's plea, demurrer, and answer; Donaldson's, Duff's, Alexander's, and Cuming's special replication filed to the said answers. General replication and rejoinder: Gordon's and Bullen's answer, Bordley's answer, McCleod's answer.

OGLE, Chancellor.—Ordered, that warrant of resurvey issue at the instance of the defendants directed to Mr. Henry Ridgely, and that the said warrant be returned by next court. Upon motion, Ordered, warrant of resurvey issue directed to Mr. Henry Ridgely and William Cromwell, or either of them; and that either party give the other notice of executing the said warrant.

May, 1736.—Replication to Bordley's answer filed; warrant of resurvey returned; William Cuming on behalf of himself, and as counsel for sundry defendants in this cause, prays leave to except to the return of the warrant of resurvey, directed to Henry Ridgely, with the plot of the complainant's pretensions, because, that the surveyor did proceed to lay out and plot the lands before there was any proof of the bounds.

OGLE, Chancellor.—The motion being considered, this court doth declare, that the above is not any good exception to the return made by the said Ridgely. Referred to the master to examine evidences.

October, 1736.—William Cuming, Esq. on behalf of himself, and as attorney of William Alexander and James Donaldson, who all claim under a purchase from Kingsmill Eyre, the devisee of governor Nicholson, part of the land in dispute, by the name of the Vineyard, prays, that he may have leave to return a plot of the said land called the Vineyard, with their pretensions thereto; which is granted accordingly.'—*Chancery Proceedings*, lib. J. R. No. 2, fol. 684, 720, 759, 769.

(b) *CHESELDINE v. GORDON*, post.

PARKER v. MACKALL.—This bill was filed on the 20th of January, 1734, by

dispersed situation of witnesses; to the convenience of having their examinations taken at or near their respective residences; and

Gabriel Parker, against John Mackall. It states that the plaintiff's father, George Parker, made his last will, appointing his wife Susannah, the plaintiff's mother, his executrix, and died on the 4th of March, 1710, possessed of a great personal estate and seized of a considerable real estate, great part of which descended to the plaintiff as heir at law, who was then about twelve years of age; that the said Susannah, took upon herself the office of executrix, and returned an inventory; and afterwards married the defendant, by virtue of which he possessed himself of all the real and personal estate of the plaintiff's; and also got into his possession several lands and personal property of the plaintiff's, consisting of money and slaves, one of whom was an expert carpenter and cooper, which had been devised and bequeathed to the plaintiff by his grandfather, Gabriel Parrott. That the plaintiff married at about sixteen years of age, and soon after demanded of the defendant the delivery of his estate, which the defendant refused to make; except some household furniture, two negroes, and twenty sheep, which were represented to have been delivered at their appraised value, although not worth so much then as when appraised; and yet the defendant, taking advantage of the plaintiff's youth, by misrepresentation, actually charged him more than the amount to which it had been appraised. That the plaintiff had received from the defendant several sums of current money which he alleged were payments in sterling money; that after the death of the plaintiff's father, there arrived here sundry goods from England, the property of the plaintiff, which came to the hands of the defendant, and were converted by him to his use; which goods then bore cent. per cent. and upwards, advance, but were inventoried by the defendant at the prime cost in sterling money; that the defendant had actual occupation, possession and advantage of all the plaintiff's real and personal estate for five or six years before he came of age, of which the defendant made or might have made very great profit and advantage, and did not during all that time maintain the plaintiff, or make him the least satisfaction for such use and occupation of his estate. Upon which it was prayed, that the defendant might account for the personal estate, and for the rents and profits of the real estate, and the interest thereof; that he might make reparation for the waste and spoil committed by him on the plaintiff's lands and improvements; and that the plaintiff might be otherwise relieved in the premises as should seem agreeable to equity.

At May court, 1735, the defendant exhibited his answer to the bill of complaint; and the same court the complainant filed exceptions thereto; which exceptions coming to be argued the same court before the Chancellor, in presence of counsel learned on both sides.

OGLE, *Chancellor*.—This court doth declare, that the exceptions to the said answer are good, and the answer of the defendant adjudged insufficient, and *Ordered*, that the defendant pay the complainant six hundred pounds of tobacco for his delay. And it is likewise *Ordered*, that subpoena issue against the defendant for the costs; and to put in a better answer to the aforegoing bill.

After which, at December court, 1735, the defendant filed his answer, in which he admitted, that George Parker, the father of the plaintiff, made his will and died as stated, leaving real and personal estate; that the defendant had married the widow; and also that Gabriel Parrott died leaving an estate as stated; but that the defendant had regularly and legally accounted for and paid to the creditors, legatees, and next of kin, all the personal property which had come to his hands; that the

to there being few cases in which all the witnesses were to be found in, or could be brought before a master in *Annapolis*, where the

household furniture, negroes and sheep, had been delivered to the plaintiff, without any misrepresentation, at a fair valuation; that the mulatto fellow Ned, the property of the plaintiff, was an ordinary carpenter and cooper, from whom the defendant received no other benefit than from an ordinary slave; that the defendant had possession of the plaintiff's personal estate for about five years and three months, that is, from the time of the defendant's marriage with the plaintiff's mother until he came of age, and paid the quit rents of his lands in St. Marys, but never during his possessing them, received any more than £13 18s. 3d. and 4376 lbs. of pork; that of the plaintiff's lands in Anne Arundel a part was seated, whereon the defendant had negroes who were employed in making crops, and another part on which his overseer's wife lived; but that this defendant never was at but one of the said tracts of land; that the plaintiff's lands in Prince George's, were not seated or ever seen by the defendant; that he does not know that there ever was any seated plantation on the plaintiff's lands in Baltimore county; that for the plaintiff's lot in Huntingtown, the defendant had received the hire of about 1200 lbs. of tobacco; and that this defendant had a right to the occupation and profits of the plaintiff's lands without accounting for the same.

At May court, 1736, the plaintiff put in a general replication to this answer, and the defendant rejoined; and so, the parties being at issue, divers witnesses were examined and their depositions published according to the course of the court, the master in chancery made a return as follows:

'In pursuance of an order of the Court of Chancery, bearing date the 25th day of May, in the year of our Lord 1736, I have proceeded to examine Thomas Sanner of St. Mary's county, planter, James Biscoe of the same county, planter, James White, of the same county, planter, John Gaines of Calvert county, planter, Josias Sunderland of the same county, planter, James Dukes of the said county, planter, Samuel Griffin of the same county, planter, Francis Gaines of the same county, planter, Walter Phelps of Anne Arundel county, planter, and Jonathan Taylor of the same county, planter, as witnesses for the complainant, whose examinations, together with the interrogatories filed by the complainant in this cause, hereunto annexed. I humbly return into this honourable court. B. YOUNG, *Master in Chancery.*'

Here follow the depositions of sundry witnesses taken, as stated, before this master in chancery, which, as appears by his attestation to each, were taken at different times and places. At St. Mary's county, the 20th day of April, 1737—same place, 21st April, 1737. At Calvert county, the 17th day of September, 1737—and at Annapolis, the 22d and 29th day of October, 1737—upon all which the case was brought before the court.

2d June, 1738.—OGLE, *Chancellor*.—This case coming on to be heard and debated in presence of counsel learned on both sides, the complainant's bill and the defendant's answer, and the whole proceedings thereon being read, it appeared to be as before recited and set forth.

Whereupon this court doth *Decree*, that the defendant account for the rents and profits of the complainant's real estate which the defendant received, and which were lost by his act and neglect; and also, for the profits which might have been made by the service and earnings of the mulatto man called Ned, mentioned in the proceedings; and that all just allowances be made to the defendant for his disbursements on the complainant's account, for which the defendant has not already received

masters resided, and where the court was held, it was most usual to have the account stated by commissioners, under a commission

satisfaction; and that the master take the account and the examination of such witnesses as may be necessary, and report the same to the court.

Pursuant to which the master made his report, and certified the same into this court, as follows, viz:

The examination of Samuel Taylor of Prince George's county, planter, taken before me by virtue of a decree of the High Court of Chancery, &c. Here follows the deposition of the witness, which it may be inferred from its not being said where taken, that it was taken and sworn to before the said B. Young, master in chancery, in Annapolis. Upon which the master reported in the following words:

'In pursuance of a decretal order made in this cause, bearing date the 2d day of June last, I have been attended by the counsel for the complainant and the defendant in this cause; and the complainant having filed with me an account of his demand for the rents and profits of his real estate, which he suggested to have been received by the complainant, or lost by his act, or neglect; and also for the profits which might have been made by the service and earnings of the mulatto man called Ned, mentioned in the proceedings, the particulars whereof are set forth in the first schedule to this, my report, annexed. And the defendant having also filed with me an account of his demand for payments, and disbursements on the complainant's account, for which he suggested, that he had not yet received satisfaction, the particulars whereof are set forth in the second schedule to this, my report, annexed; and having likewise examined such witnesses as appeared to me necessary, I have proceeded to take the account.

'And I find, by the defendant's own acknowledgement, that he had the management and possession of the complainant's real estate, and the mulatto man called Ned, in the proceedings mentioned, for at least five years before the complainant came of age; and that the rents and profits of the complainant's real estate, which lies in Saint Mary's county, mentioned in the first five articles of the first schedule to this, my report, annexed, did, for the first of the aforesaid five years, amount unto the sum of 2600 pounds of tobacco; for the next of the aforesaid five years, to the sum of 2850 pounds of tobacco; and for the remaining three of the aforesaid five years, to the annual sum of 3600 pounds of tobacco; which I find, by comparing the testimony of James White, with that of Thomas Sanner and James Biscoe, witnesses sworn and examined in this cause before the hearing thereof; which several annual sums being taken together, for the whole time aforesaid, do amount unto the sum of 16,250 pounds of tobacco; which I have allowed the complainant for the rents and profits of that part of his real estate which lies in Saint Mary's county.

'And I find, that the value of the profits of the complainant's real estate, which lies in Anne Arundel county, mentioned in the sixth article of the first schedule to this, my report, annexed, did amount to the yearly sum of 2000 pounds of tobacco; which I find proved by the testimony of Jonathan Taylor of Anne Arundel county, a witness sworn and examined in this cause, before the hearing thereof; which, for the whole five years aforesaid, does amount to the sum of 10,000 pounds of tobacco; which I have allowed the complainant for the rents and profits of that part of his real estate which lies in Anne Arundel county.

'And I also find, that by the acknowledgment of the defendant, the rents and profits of a store-house and lot, in Huntingtown, belonging to the complainant, mentioned in the seventh article of the first schedule to this, my report, annexed, did, for the

to audit accounts. Such commissions were very common under the provincial government; and may now be issued in any case,

whole five years aforesaid, amount unto the sum of 1200 pounds of tobacco; which I have also allowed to the complainant for the rents and profits of that part of his real estate which lies in Calvert county. Which several sums of tobacco being taken together for the whole rents and profits of the complainant's real estate, during the time aforesaid, do amount unto the sum of 27,450 pounds of tobacco, which I have reduced to sterling money, at the rate of 12s. 6d. per cwt.; which, having considered the testimony of Thomas Sanner and James White, witnesses sworn and examined in this cause before the hearing thereof, the first of which deposeth, that to the best of his memory, tobacco bore a good price from the year 1713 to the year 1718; and the second, that for the last two years, wherein he received the rents, that to the best of his memory, it was worth about fifteen shillings sterling, in bills of exchange, I have estimated to have been the market price of tobacco, taking it as a mean for the five years aforesaid; at which rate it does amount unto the sum of £171 11s. 3d. sterling; which sum of money I have allowed the complainant for the whole rents and profits of his real estate during the five years aforesaid.

‘And I likewise find, that the value of the profits which might have been made of the mulatto man called Ned, mentioned in the proceedings, for five years and one quarter, which time the defendant had the said Ned in his possession, did amount unto the sum of £105 gold currency, as charged in the eighth article of the first schedule, to this, my report, annexed, which I have estimated at the rate of twenty pound, gold currency, per annum; and allowed to the complainant, upon the testimony of Francis Gaines, John Gaines, and Samuel Griffin, witnesses sworn and examined in this cause before the hearing thereof: and the confession of the defendant in his answer, which admits the said mulatto Ned to have been an ordinary carpenter and cooper.

‘I have likewise considered the allowances prayed to be made by the defendant in the second schedule, to this, my report, annexed; and have not made any allowance for the first article therein contained, of two negro men, which the complainant had of the defendant, for about five years before he came of age; they being acknowledged by the defendant, to be part of the complainant's estate; and the complainant not appearing to have been any charge to the defendant during that time. But I have allowed the defendant for maintaining a negro girl, mentioned in the second article of the second schedule, to this, my report, annexed, at the rate of 300 pounds of tobacco per annum; which, for the first five years therein mentioned, does amount unto the sum of 1500 pounds of tobacco; the said girl not being able then to work for her maintenance. I have also allowed, with the agreement of the complainant, to the defendant 1525 pounds of tobacco, and 77 bushels of wheat; which I have reduced to tobacco at forty pounds of tobacco per bushel, and does amount unto the sum of 3080 pounds of tobacco, for the quit rents of the complainant's lands, paid to the receiver of the rents for the right honourable the Lord Baltimore, as mentioned in the third article of the second schedule, to this, my report, annexed; all which tobacco being taken together does amount unto the sum of 6105 pounds; which being reduced to sterling, at the rate of 12s. 6d. per cwt. does amount unto the sum of £38. 3s. 1½d. sterling.

‘I have also allowed, by the admission of the complainant, upon the oath of the defendant, for one pair of calash wheels, £2 12s. 6d. sterling; for two looking glasses, £2 sterling; for two pair of iron dogs, £2 sterling; for a large folding-table, £1 sterling, as mentioned in the fourth, fifth, sixth, and seventh articles of

in which circumstances may render it necessary or proper. (c) It appears to have been always understood, as well settled, that

the second schedule, to this, my report, annexed. For the eighth article in the second schedule, to this, my report, annexed, of a horse, bridle and saddle, and case of pistols, and sword, I have made no allowance; it appearing that the complainant had the things therein mentioned, of his mother, before her intermarriage with the complainant. But I have allowed, by consent of the complainant, for thirty-six pounds of pewter, £1 sterling; and for one beef, £1 15s. sterling, as mentioned in the ninth and tenth articles of the second schedule, to this, my report, annexed. All which several sums of sterling money together do amount to the sum of £48 10s. 7½d.; which I have allowed to the defendant to be deducted out of the sterling money above allowed to the complainant. And I have likewise allowed the defendant, with the consent of the complainant, upon the defendant's oath, for \$11, delivered by the defendant to the complainant, £2 9s. 6d. gold currency; and for two casks of cider, containing about 200 gallons, £5 gold currency, as mentioned in the eleventh and twelfth articles of the second schedule, to this, my report, annexed; which two sums of current money do amount unto the sum of £7 10s. 6d.; which I have allowed to the defendant, to be deducted out of the currency above allowed to the complainant; which sum of £48 10s. 7½d. so as above allowed to the defendant; being deducted from the sum of £171 11s. 3d. so as above to be allowed to the complainant, leaves the sum of £123 0s. 7½d. sterling money, which, after the deduction aforesaid, I find to be the clear balance, in sterling money, due to the complainant; and the sum of £7 9s. 6d. gold currency, so as before allowed the complainants; being deducted from the sum of £105 gold currency, as above allowed the complainant, leaves the sum of £97 10s. 6d.; which, after the deduction aforesaid, I find to be the clear balance, in current money, due to the complainant.

‘And I have considered the complainant's demand of interest in the ninth article of the first schedule to this, my report, annexed: and, inasmuch as I have no directions, by decree of this honourable court, to make any such allowance, I have not presumed to determine any thing therein—and I have annexed a third schedule to this, my report, wherein I have stated the account according to the allowances, above mentioned, between the complainant and defendant; and struck the balance thereof, for the more ready inspection of the court.—All which I humbly certify and submit to the judgment of this honourable court.—B. YOUNG, *Master in Chancery.*’

Upon motion, on the 28th of February, 1738, by the complainant's counsel it was prayed, that the said report might stand confirmed, and that the complainant might be allowed interest for the sum of money appearing by the said report to be due from the defendant to the complainant, from the 4th day of December, 1718, the time on which the complainant came to the age of twenty-one years, with his costs of this suit.

To which report the defendant, by his counsel, filed the following exceptions: This defendant excepts to the master's report, *first*, for that he hath allowed the complainant the quantity of tobacco, in the report mentioned, for lands lying in Anne Arundel county, which were quarters, seated at the death of the complainant's ancestor, whereon there was a stock of negroes, cattle, &c.; and were never tenanted, or rented out by the said complainant's ancestor, or the defendant—*second*, for that the master has allowed, at the rate of £20 gold, per annum, for the work of mulatto Ned, which is a sum much beyond what he ever did, or could earn—and

(c) Clapham v. Thompson, 1 Bland, 124, note; Dorsey v. Hammond, 1 Bland, 465.

a commission to audit accounts, clothed the commissioners with all the powers properly belonging to a master in Chancery, under a similar reference, by an order or decree to account; except that here, under a reference of a case to a master, by an order or decree, or to commissioners by a commission to account, the depositions of witnesses were never taken secretly, as before a master in *England*, or as formerly here, under an ordinary commission to examine evidences; but always, as now, after notice to the parties, the witnesses were examined publicly in the presence of the parties, if they chose to attend. And testimony might be so taken after publication had passed, as to the depositions of witnesses taken under an ordinary commission. (*d*) It appears to have

for that the defendant was always ready to deliver the said Ned to the complainant, if he would have indemnified him therein—*third*, for that the master hath not allowed to him the quantity of tobacco, by him charged, for the service of two negro men, which the complainant had the possession and use of for above five years; and who were, all that time, at the risk of the defendant—and *fourth*, because the master has allowed the complainant the quantity of tobacco, mentioned in the report, for the lands lying in Saint Mary's county, without having, as this defendant is advised, proper evidence to justify such allowance.

28th February, 1738.—OGLE, Chancellor.—Upon debating the said exceptions, and hearing what was alleged by counsel on both sides, it is

Decreed, that the said exceptions are insufficient; and therefore over-ruled; and that the said report, and all the matters and things therein contained, do stand ratified and confirmed, by the order, authority and decree of this court, to be observed and performed by all parties, according to the tenor and true meaning thereof. And it is hereby further *Decreed*, that the defendant pay to the complainant the legal interest, in sterling and gold currency, of £97 10s. 6d. gold currency, and £123 0s. 7½d. sterling, reported to be due to the complainant from the defendant, as aforesaid, to be computed from the said 4th day of December, 1718, the time of the complainant's being at the age of twenty-one years: and also, that the defendant pay to the complainant the costs of suit in this cause by him, in this court, laid out and expended. *Chancery Proceedings, lib. J. R. No. 4, fol. 1 to 57.*

(*d*) WOODWARD v. CHAPMAN.—This bill was filed, on the 4th of December, 1742, by Henry Woodward, an infant, by Edward Dorsey, his guardian, and Mary, Elizabeth, and Eleanor Woodward, infants, by Richard Dorsey, their next friend, against Levin Gale and William Chapman. The bill stated, that the plaintiff's father, Amos Woodward, died on the 16th of March, 1734, intestate, leaving a very large personal estate, consisting of negroes, ready money, plate, rings, a sea vessel, which had after his death, been sent to Barbadoes, brought a return cargo of rum, &c. Besides which, the intestate had left *choses in action*, and other goods and chattels of very considerable value, sufficient to pay all his debts, with a great surplus. That administration of the intestate's estate, had been granted to his widow, Achsa Woodward, the mother of the plaintiffs: that the negroes, belonging to the estate of the intestate, Amos, the year he died, made a large crop of corn, tobacco, and other things; which the administratrix, Achsa, never accounted for; but converted to her own use; that she, accordingly, had taken possession of the intestate's estate,

been common in all cases, where there were any peculiar circum-

and returned an inventory and list of debts, to the commissary's office, in which she failed to include many articles of property of great value, and several good debts due to the intestate, and had sold seven of the negroes belonging to the estate of the intestate. That she had afterwards intermarried with Edward Fottrell, who, although he had notice of the omissions in the inventory and return of the said Achsa, had failed to make any return thereof, as he ought to have done. That the said Achsa died in February, 1742, intestate; and afterwards, in the same month, the said Edward died, having previously by his will appointed Basil Dorsey and Alexander Lawson his executors, who, having refused to act as such, administration, with the will of the said Edward annexed, had been granted to these defendants; and that letters of administration *de bonis non*, of the intestate Amos; and of administration of the intestate Achsa, had been also granted to these defendants. That the plaintiffs had been put to school a very little time, and had no other means to defray the expense of their schooling and maintenance. And that the defendants had sold the greater part of the negroes belonging to the estate of the intestate Amos. Whereupon it was prayed, that the defendants should be compelled to make up a full account of the estates of the intestates Amos and Achsa, and deliver to the plaintiffs their distributive part thereof; and in the mean time to give and allow to the plaintiffs a maintenance and education according to the interest and profits of their estate; and that they might be relieved in all and singular the premises.

The defendant Chapman by his answer admitted the death of Amos Woodward; that the plaintiffs were his children; that administration had been granted, as stated in the bill, to Achsa, her marriage, and the death of her and her husband Fottrell; and the administration granted on their estates to these defendants: but denied, that any administration *de bonis non* had ever been granted, as charged, on the estate of the intestate Amos. This defendant denied that there was any crop begun and growing on the plantation of the intestate Amos, at the time of his death: and further, that this defendant knew nothing of the nature and amount of the estate which had come to the hands of the administratrix Achsa, or her husband Edward; or how that which had, as was alleged, come to their hands, had been administered. Other matters were set forth by this defendant, who, in conclusion, stated, that he was willing to account and pay under the direction of this court.

The defendant Gale answered to the same effect; and admitted, that a sea vessel, belonging to the intestate Amos, had, since his death, been sent to Barbadoes, and had brought back a cargo of rum, &c. which had come to the hands of the administratrix Achsa. This defendant also admits, that there was on the plantation of the intestate Amos a small quantity of wheat in hand, or begun at the time of his death. And that the administratrix did sell and dispose of, upon credit, several negroes, belonging to the estate of her intestate, viz: Sarah and her sucking child, Jacob, Boson, Betty, Boson, ailing, and Beck, for £162 sterling; which were appraised to £140 current paper money. [Bills of Credit under the act of 1733, ch. 6.] But this defendant knows nothing of the manner in which the administratrix Achsa administered or accounted for the estate of her intestate which came to her hands. This defendant concludes by declaring his readiness to account as the court may direct, &c.

February, 1743.—BLADEN, Chancellor.—*Ordered*, with the consent of the defendant Gale, that an allowance of £40 currency be paid to the guardian of Mr. Woodward's children, for the maintenance of the said children until the next court; and that such sum be deducted out of such part of the estate as shall appear to be due to them.

stances, as to which the court required information ; or where the

The plaintiffs put in a general replication to the answers of the defendants ; upon which a commission was issued, in the usual form, 'to examine evidences, and also to audit, state, settle and adjust all accounts,' between the parties. (*Clapham v. Thompson*, 1 *Bland*, 124, *note*. *Dorsey v. Dulany*, 1 *Bland*, 465, *note*.) Under which commission much testimony was taken : from which an account was stated ; as to all which the commissioners made report as follows :

'To his excellency, Thomas Bladen, Esq. Chancellor of Maryland—We humbly certify, that by virtue of the commission hereunto annexed, and to us directed, (having chosen Richard Burdus to be our clerk,) we met on several days and times, and proceeded to take the depositions of Messrs. John Lomas and Edward Dorsey to several interrogatories, to them severally administered, as by the same interrogatories and depositions hereunto annexed will appear.—And we further certify, that we have stated, audited, settled, and adjusted all such accounts as were, by either party, produced ; and have computed the interest on bonds, from the time of their administration granted, till payment of principal ; part of which interest we find paid, and the other part not paid, as by the first and second columns of the account A, hereunto annexed, appears ; and humbly submit it to your excellency, whether Mr. Woodward's estate ought to have the benefit of the interest received after administration granted, or the administratrix ; and whether the administratrix ought to be chargeable with interest, mentioned in the second column, when it does not appear to us, that any was received.

'And we find, that Edward Fottrell, and Achsa his wife, are chargeable for the personal estate and debts due to the said Amos Woodward, exclusive of the rum cargo, to the amount of £96 17s. 2d. £27 15s. 5d.—2732 pounds tobacco—£1367 7s. 11½d. gold—£815 19s. 1d. sterling—£2502 11s. 0¼d. paper money ; including the interest referred to your excellency's consideration, as by the said account marked A, hereunto annexed, may also appear ; and also are chargeable with several articles, to the amount of the sum of £1198 10s. 3d. which are to be returned in kind, as by the said account marked A, appears ; and also are chargeable for sundry debts due on the butcher's book, which is also included in the said account marked A, as by the account marked B, will appear.—And that they, the said Edward Fottrell and Achsa his wife, have paid sundry debts due from the said Woodward to sundry persons, which, we apprehend, ought to be deducted out of the total amount of the account marked A, amounting to 2246 pounds tobacco—£1133 2s. 0d. gold—£298 18s. 2d. sterling, as by the account marked C, hereunto annexed, may appear.

'And we further certify, that there are sundry debts, that appear to be due from sundry persons to the said Amos Woodward, as well on his ledger, as on his butcher's book, amounting in the whole to the sum of 600 pounds tobacco—4565 pounds tobacco—£780 7s. 3½d. gold—£383 11s. 8¼d. sterling, and £78 6s. 5¼d. paper money, as by the accounts marked D and E, hereunto annexed, may also appear ; but does not appear to us to have been received either by the said Fottrell or his wife. All which is humbly submitted to your excellency, by Thomas Worthington, John Brice, Nicholas Maccubbin, John Bullen.'

At December court, 1746, the defendant Gale being dead, and the case as to him being abated, the defendant Chapman filed the following exceptions to the said report. *First*. That since the order for publication of the examinations and proceedings of the said commissioners it appears, that a certain John Lomas, and the aforesaid Edward Dorsey, were respectively examined, and have deposed to interrogatories filed on behalf of the complainants in the above cause ; and for that this exceptant had not any notice of the time and place of such intended examination,

account was to be stated in a particular way, for the Chancellor to

previous thereto, as according to the use and practice of this court, in like cases, he ought to have had; he humbly hopes the said depositions, or any of them, shall not be read, or made use of; but shall be wholly and entirely suppressed. *Second.* That it appears by the complainants' bill, and admitted by this defendant's answer, that Amos Woodward, the complainants' father, died about the 16th day of March, 1734; and although it is denied by this exceptant's answer, that there was any crop, either of tobacco, corn, or any other grain, or crop whatsoever, belonging to the said Amos Woodward, begun, or in hand at the time of his death; and the same is not contradicted by any proof, appearing among the proceedings of the said commissioners, they have, notwithstanding, in the account by them stated and returned, made an allowance of £50 paper to the said Amos Woodward's estate, for the labour of sundry servants and slaves on his plantation, from the time of his death until July following, which this exceptant humbly conceives to be against law and equity. *Third.* That it appears by the proceedings, that there are two several estates dependent on the estate of the said Amos Woodward, that is to say, the estate of the said Achsa Fottrell, to which this exceptant is administrator, and also the estate of the said Edward Fottrell, to whom this exceptant is also administrator, with his will annexed; and that the estate of the said Edward Fottrell is also dependent on the estate of her, the said Achsa Fottrell; notwithstanding which the said commissioners have, in their manner of stating the accounts, blended the several transactions together; and have not distinguished what moneys were received by the aforesaid Achsa, during her widowhood; and what by the said Edward Fottrell, after his marriage, in the proceedings in this cause set forth; nor, if this honourable court should be of opinion, that the estate of the said Amos Woodward should be credited with the interest in the accounts mentioned, have they distinguished and shewn, whether the interest, so said to be received or omitted to be received, was so received or omitted to be received by the said Achsa Fottrell, or by the said Edward Fottrell, thereby to enable this court to determine to which of their two estates the same is chargeable and to be charged.

May, 1747.—OGLE, Chancellor.—The exceptions to the commissioners' report standing for argument, and the counsel on both sides being heard, it is *Ordered*, that the exceptions be overruled; and that the defendant pay to the complainants the quantity of 600 pounds of tobacco for the delay; and that there be a hearing of the said cause the next court.

After which the case was brought before the court, and the solicitors of the parties were fully heard.

October, 1747.—OGLE, Chancellor.—*Decreed*, that the said William Chapman pay, out of the estate of Achsa Fottrell, and Edward Fottrell, which have come to his hands, to each of the complainants the sum of $43\frac{1}{2}$ pounds of tobacco, £51 15s. $3\frac{1}{2}$ d. current money, in gold or silver, £216 7s. $0\frac{1}{4}$ d. sterling money of Great Britain, of which said sum £80 10s. $6\frac{1}{2}$ d. is each child's part of the price of the negroes belonging to the estate of Amos Woodward, as the same were sold by Achsa Woodward and Levin Gale, and William Chapman, exclusive of any negroes that were Edward Fottrell's, or which came to his possession, in any other manner than by his marriage with Achsa Woodward, administratrix of Amos Woodward; and £377 19s. $10\frac{1}{2}$ d. paper money of Maryland, [1733, ch. 6.] And that the said William Chapman shall, out of the said estate of Achsa Fottrell and Edward Fottrell, which have come to his hands, likewise make payment of the several sums following, *to wit*, to each of the complainants the sum of £9 1s. $8\frac{1}{2}$ d. paper money of Mary-

give special directions to the master, to the commissioners, or to the persons to whom the case was sent. (e) All reports of a

land, in white servants; and the sum of £32 1s. 7d. paper money of Maryland, in cattle, horses, and sheep; and the sum of £13 6s. 6d. paper money of Maryland, in plate, belonging to the complainants' late father, Amos Woodward; and the sum of £2 15s. 11d. in gold tea-spoons, belonging to the complainants' late father, as the same were valued in his estate. And it is *Ordered*, that the white servants, cattle, horses, and sheep, be valued by Thomas Worthington and John Bullen, of Anne Arundel county, gentlemen; and that they value the same, as near as can be, of like value with the white servants, horses, cattle and sheep that were appraised in the estate of the complainants' father, Amos Woodward.

And it is further *Decreed*, that the said William Chapman pay unto the complainants, out of the estate of Achsa Fottrell and Edward Fottrell, which have come to his hands, interest at the rate of six pounds per cent. per annum on the sum of 43½ pounds of tobacco, [1704, ch. 69, s. 1;] £51 15s. 3d½. current money, in gold or silver; £216 7s. 0¼d. sterling; and £377 19s. 10d. paper money of Maryland; which is due to each child, exclusive of white servants, cattle, horses, sheep, plate, and gold tea-spoons. It being thought reasonable, by this court, that no interest should be paid for so much of the estate as consisted in white servants, cattle, horses, sheep, plate, and gold tea-spoons, which are to be returned in specie to each of the complainants, [1715, ch. 39, s. 11, 12, 16, and 17,] from the 15th day of February, in the year of our Lord 1741, till the same be paid to the complainants. And, that so much as is decreed to be paid to the complainants Mary and Elizabeth, who are arrived at the age of sixteen years, to be paid into their own hands, [1715, ch. 39, s. 15;] and that so much as is decreed to be paid to the complainant Henry, be paid to Edward Dorsey, his guardian; and that so much as is decreed to be paid to the complainant Eleanor, be paid to John Ridgely, her guardian; and that the said Edward Dorsey and John Ridgely respectively give security, at the next court to be held for Anne Arundel county, to be approved of by the justices of the said court, to pay such sums as they have, or shall receive of the said Chapman, to the said Henry Woodward when he shall arrive at the age of twenty-one years; and to the said Eleanor Woodward when she shall arrive at the age of sixteen years; and that the complainants, or their guardians, give unto the said William Chapman good security to return a rateable part of what they shall receive to satisfy any debt or debts which shall hereafter appear to be due from the said Amos Woodward, with the payment whereof the law will charge the said William Chapman as administrator; and that the complainants pay two-thirds of the costs of this suit; and the said William Chapman one-third part thereof. And it is further *Ordered*, that the said William Chapman use his utmost endeavours to receive what debts are due to the estate of the said Amos Woodward at this time; and that he render an account of what he shall receive, upon oath, to this court, by the last day of November next.—*Chancery Proceedings, lib. J. R. No. 5, fol. 157 to 212.*

(e) *SLOSS v. McILVANE*.—This was a bill for an account, filed on the 16th of May, 1760, by Thomas Sloss against William and David McIlvane; in which the dealings and transactions between the parties were set out at great length. The bill concludes by alleging, that the defendants are residents of Philadelphia, but are expected soon to be in the province—upon which it prays a *ne exeat*, to the sheriff of Kent, and also a duplicate of the writ to the sheriff of Cecil.

To this bill, an affidavit was subjoined in the following words: 'The said Thomas Sloss, the complainant in the annexed bill of complaint, makes oath, that the said William and David McIlvane, the defendants in the said bill named, are justly

master, of a special master, and of commissioners to account were

indebted to him in the sum of £300 current money, or upwards, or the value thereof, which he cannot now exactly ascertain; and that the said defendants are merchants of Philadelphia, and intend, or one of them intends, as this deponent believes, soon to be in this province about business; but that, in a very little time, they will again leave and depart this province, and again return to Philadelphia; and likewise that he doth believe the recovery of the said debt will be very precarious, unless they are stayed by a *ne exeat provinciam*.—Sworn to this 16th day of May, 1760, before John Bullen.’

‘Whereupon, accordingly issued *ne exeats* and *subpœnas* against the aforesaid William and David McIlvane to appear and answer the bill aforesaid—and the said cause standing so continued until April court, 1762. It was then *Ordered*, that a commission issue, directed to Messrs. William Sword, William Humphreys, William Murray, and Andrew Eliot, merchants in Philadelphia, to take the answer of the said defendants William and David McIlvane, to the aforesaid bill of complaint of Thomas Sloss, complainant, which issued accordingly.’

The defendants having answered, and the parties being at issue; a commission was issued to examine evidences in the then usual form, requiring the commissioners to cause notice to be given to the parties, or their attorneys, of the execution of the commission: and after they had taken the depositions, to ‘send the same, together with this our commission *close*, under your, or any three, or two of your hands and seals to us in our High Court of Chancery,’ &c. After which, the case was brought before the court.

February, 1770.—EDEN, *Chancellor*.—It is *Decreed*, that the defendant do pay to the plaintiff what, on account to be taken, shall appear to be due; and, in order that the same may be settled and liquidated, that commission do issue to Messrs. John Davidson, Thomas Harwood, Thomas B. Hodgkin and Thomas Hyde. And, as touching and concerning the claim or charge of commission, or allowance, in the complainant’s bill mentioned; it is by the court, *Ordered* and directed, that the same, or any part thereof, be not admitted; and as touching or concerning any other matter or thing, in taking the said account, liberty is granted, should occasion require, to apply, from time to time, for the further order and direction of the court, as well on the part of the complainant as of the defendant.

This case having abated, by the death of the defendant, who was the surviving partner, a bill of revivor was filed against Levin Wilson, his administrator, who filed his answer thereto, sworn to before a justice of the peace.

‘Whereupon, it is *Ordered*, by his excellency, the Chancellor, that the proceedings in the cause shall stand and be revived; and that the commissioners, heretofore appointed by this court to state and liquidate the accounts between the parties, proceed in stating and liquidating the same.’

The commissioners stated and reported an account accordingly, and the case was brought before the court for a final decree.

18th May, 1773.—EDEN, *Chancellor*.—*Decreed*, that the defendant Levin Wilson, as administrator aforesaid, pay and satisfy to the complainant Thomas Sloss, the sum of £497 5s. 7½d. common money, the balance due to the complainant, on the first day of January, 1759, appearing by the account taken and returned in this cause, together with legal interest on £389 5s. 0¾d. part thereof, which part is in no sort constituted of interest, from the said first day of January, 1759, until the time of settling the said account, *to wit*, the 16th day of February, 1773; and also with

subject to exceptions ; which were required to be taken and filed within a limited time. (*f*)

The legislature of the republic has authorized the Chancellor to appoint, during his pleasure, a person of integrity, judgment and skill in accounts to be auditor for the Court of Chancery ; and has also declared, that all accounts directed by the Chancellor to be stated, shall be referred for such purpose to the auditor, who shall have authority to administer an oath to all witnesses, and persons proper to be examined upon such account ; and shall state such accounts agreeably to the order of the Chancellor, and return the same, to be done with as the Chancellor shall think just. (*g*)

But there is nothing in that, or in any other legislative enactment which either expressly, or virtually withholds from the auditor any other authority which necessarily, or properly belongs to his office ; or which abrogates any powers or duties which had been assigned to masters in Chancery, to commissioners to audit accounts, to an auditor, or to any other similar officer, whose assistance the Chancellor had found to be useful, or indispensably necessary to the proper exercise of his jurisdiction. Conse-

interest on the said sum of £ 497 5s. 7½*d.* from the said 16th day of February, 1773, until such time as the same shall be paid and satisfied.

And further, that the defendant Levin Wilson, administrator aforesaid, pay and satisfy to the complainant Thomas Sloss, the further sum of £ 323 10s. 3½*d.* sterling ; and 683½ pounds of tobacco, being the sum of money and tobacco paid by the complainant, according to the order of this court, made on the 20th day of February, 1767, to the aforesaid William McIlvane, with interest on the said sum of sterling money and tobacco, from the 1st day of July, 1767, the time when the same was paid by the complainant, until the same shall be again paid to him.

And further, that the defendant, as administrator aforesaid, pay to the complainant all costs expended by him in this suit, as well as all costs expended by him in the action formerly depending in the Provincial Court, mentioned in the said former order ; and the plaintiffs' and defendants' costs of the action brought, in Somerset County Court, by Thomas Dasheall, against this complainant for fees on the execution issued on the judgment obtained at law, by the said William McIlvane against the complainant.

And because it does not appear to this court, that the defendant Levin Wilson, as administrator aforesaid, hath any assets in his hands wherewith to satisfy this decree, it is *Ordered*, that the same be paid and satisfied out of any assets which may hereafter come to the hands of the defendant, to be administered.—*Chancery Proceedings, lib. W. K. No. 1, fol. 166 to 209.*

(*f*) 'February, 1735.—*Sedente curia*.—Ruled, that exceptions to reports made by the master, be filed twenty days before the succeeding court, after the report is made ; or report to stand confirmed.'—*Chancery Proceedings, lib. J. R. No. 2, fol. 735.*

(*g*) 1785, ch. 72, s. 17 ; *Rawlings v. Stewart*, 1 Bland, 22, note ; *Clapham v. Thompson*, 1 Bland, 124, note ; *Bryson v. Petty*, 1 Bland, 182, note ; *Dorsey v. Dulaney*, 1 Bland, 465, note ; *Cox v. Callahan*, ante 46, note.

quently, this legislative enactment, so far as it goes, can only be regarded as an affirmance of the pre-existing powers of the Chancellor. And this court has, in many cases, since the passage of that law, assumed the position, that it was in fact nothing more, so far as it went, than an affirmance of its pre-existing powers; it has, where occasion required, issued a commission to audit accounts; it has referred cases to persons with directions to perform duties properly belonging to a master in chancery or auditor, considering them as *special auditors*; and it has, in various instances, treated the auditor as a standing officer of the court, clothed with powers analogous to those of a master in chancery in *England*; and with all such powers as had been formerly understood to belong to a master in chancery here. (*h*)

In fine, deeming it to be entirely within the legitimate scope of the auditor's powers to make any inquiry, to take testimony, to state any account, or to frame any statement which may be necessary or proper to enable the court correctly to dispose of any case in which it has the power to grant relief, I shall send this case to the auditor, with such instructions accordingly.

ORDERED, that this case be and the same is hereby referred to the auditor, with directions to report the whole value of the land

(*h*) MAIDWELL v. GRIFFITH, 1787.—ROGERS, *Chancellor*.—Ordered, that John Weatherburne be appointed auditor, to make, state, and take an account between the parties to this suit.—*Chancery Proceedings, lib. S. H. H. lett. B. fol. 32.*

KERR v. RAWLINGS.—December, 1789.—HANSON, *Chancellor*.—An account having been heretofore decreed, and the complainant's counsel having applied to the court for instructions to the auditor in stating it; and several points relative thereto, having been debated; the Chancellor is of opinion that, &c. &c. that the account to be stated agreeably to the instructions, be open to the exceptions of either party.

The auditor reported an account accordingly, to which exceptions were filed which were decided upon in the final decree.—*Chancery Proceedings, lib. E, fol. 311.*

TOWERS v. HANNAN.—5th May, 1807.—KILTY, *Chancellor*.—Decreed, as to the part of the said bill praying for a conveyance, that the defendant J. Hannan, do by a good and sufficient deed, executed, acknowledged and delivered according to law, convey to the complainant E. Towers, the premises, in the proceedings mentioned, to wit, a lot and dwelling house in the city of Baltimore, situate in Albemarle street, being part of a lot, number 326, containing 20 feet in front, and 40 feet in depth, with all and singular the appurtenances and privileges thereto belonging. To have and to hold the same from the date of this decree; and during the term of the natural life of the said E. Towers. And it is further Decreed, that the said E. Towers have possession of the said house and lot, with the appurtenances and privileges aforesaid.

And it is further Decreed, as to the part of the bill praying for an account, that the defendant J. Hannan, account with the complainant for the rents and profits of the

in the proceedings mentioned; the annual value thereof since the death of the testator; and by whom, if by any one, the rents and profits thereof have been received, and the amount thereof; the amount of the arrearages of the annuity with interest; and the age and general state of health of the plaintiff *Anna Maria Townshend*; and that the auditor make his statements and report as to these particulars, from the proceedings and such proofs as may be laid before him. And it is further *Ordered*, that the parties be, and they are hereby permitted, to take the depositions of witnesses to be read in evidence, in relation to the matter of this order, before any justice of the peace, on giving three days notice as usual to the opposite party or his solicitor.

On the 25th of May, 1829, the auditor reported, that in execution of this order, and at the instance of the solicitor for the complainants, he issued notice to the parties, that he would attend at his office in Annapolis, on the first day of August then next, to receive such evidence in relation to the matters in dispute, as the parties should then produce before him, &c. The proof of service thereof on the defendant *Robinson*, was therewith filed. The counsel for the plaintiffs filed the following interrogatories, &c. And *Samuel Harrison of John*, a witness of lawful age, produced on the part of the complainants, being duly sworn and interrogated, deposed, &c. The auditor attended pursuant to the last adjournment; and neither party appearing, he adjourned *sine die*. That the complainants had since filed with him the deposition of *John Hanan* relative to the age and state of health of the complainant *Anna Maria*; and also their admission of the payment of three years annuity which were returned.

The auditor further reported, that upon consideration of the said testimony, and other the proceedings in the cause, the whole value of the land, in the proceedings mentioned, was \$2,983 50, or thereabouts. That the annual value thereof, at the time of the testator's death, and for five years thereafter, was \$200; and since that time to the present, \$150. And that the average annual

said lot, during the time of his possession thereof, under the judgment in the ejectment aforesaid; and that an account be taken by the auditor of this court, of the said rents and profits on the evidence in the cause, and such other evidence as the parties may produce to him; subject to the exceptions of either party; and to the further order of this court, and to its final decree thereon. The parties respectively to pay their own costs—M. S. affirmed on appeal.

value thereof, from the death of the testator to the present time, might be estimated at \$175. That said land remained in possession of *Deborah Duncan*, the deceased's widow, from his death, on the 4th of March, 1819, to the latter end of 1824, the time of her death, say for the space of six years. There was no evidence of the amount of rents and profits actually received during this period. The value thereof, according to the proofs, might be estimated at \$1150. That from the death of *Deborah Duncan*, the rents and profits of the said land had been received by the defendant *Joseph Robinson*. And the value thereof, to the 4th of March, 1829, might be estimated at \$600. That *Mrs. Duncan* discharged the annuity to the 4th of March, 1820; and the defendant *Robinson* had paid the annuity for the years ending respectively on the 4th of March, 1826; 4th of March, 1827; and 4th of March, 1828. The complainants, therefore claim their annuity from the 4th of March, 1820, to the 4th of March, 1825, and from the 4th of March, 1828, to the 4th of March, 1829; six years, at \$60, being \$360; and interest on each year as it became due, amounting to \$112 86; being in the whole, \$472 86. And that the plaintiff *Anna Maria Townshend*, was aged thirty-three years, or thereabouts, and enjoyed good health.

The defendants excepted to this report, *first*, because the auditor had not allowed to the defendants all the credit to which, by the evidence in the cause, they were entitled; especially the sum of \$20, admitted to have been paid by the late *Mrs. Duncan* over and above the amount credited to her, by the auditor in his account; *second*, because there was no evidence whatsoever in the cause, duly and regularly taken, according to the course of chancery proceedings, by which the said defendants can, in any wise, be charged or affected, or any decree passed against the infant defendants and *Robinson*, or touching or concerning the interest of said infants or said *Robinson* in the land in the bill mentioned, or otherwise; and *thirdly*, because the said report and accounts are in other respects erroneous.

After these exceptions had been filed, the plaintiffs admitted, that the late *Deborah Duncan* had paid \$20, which had not been credited by the auditor.

On the 25th of July, 1829, the infant defendants *William* and *Caroline*, by their next friend, filed their petition, in which they stated, that they could prove that *Deborah Duncan* had been appointed guardian for them by the Orphans Court of Anne Arun-

del county, and had received the rents and profits of the said land for six years; but had never accounted with the Orphans Court, as guardian, for any other sum of money than the balance remaining, after deducting from the gross amount of rents and profits, the sum of \$60 per year. Whereupon they prayed, that a commission might be issued; or some order passed to enable them to obtain the benefit of the said testimony, &c.

Upon which the Chancellor expressed a wish to hear counsel; and for that purpose *Ordered*, that the matter should stand over until further order. But the matter was not again moved on behalf of the infant defendants.

12th August, 1829.—BLAND, Chancellor.—This case standing ready for hearing, and having been submitted on notes by the solicitors of the parties, the proceedings were read and considered.

It was the well settled practice of the Court of Chancery of Maryland, under the provincial government, and has continued to be so ever since the establishment of the republic, without any doubt or interruption, that in all cases where an account was required by the court, or the parties, a special commission might issue, directing the commissioners to take testimony; 'and also to state, audit, settle, and adjust all accounts relating to the matter in dispute, that should be produced to them;' and to reduce into writing such account; and to return the same, with the depositions of the witnesses. (i) The act of assembly which authorized the court to appoint an auditor, does not, in any respect, impair or abrogate the previous ancient practice; and therefore, special commissions, calling for the return of an account along with the proofs, have often been issued since the passage of that act. (j)

Hence, as the court might clothe commissioners, appointed to take testimony, with authority to state an account from the proofs collected by them; and as it appears that formerly, when a case was referred to a master to take the depositions of witnesses, upon oath; so it has been held, ever since the passage of the act of assembly authorizing the appointment of an auditor, that when a case is referred to the auditor, by any interlocutory decree to account; or by an order directing him to state an account, or make estimates, as in this instance, from the proofs then in the case, and such other proofs as may be laid before him, such a reference in itself clothes him with the power properly belonging

(i) *Dorsey v. Hammond*, 1 Bland, 465.—(j) *Clapham v. Thompson*, 1 Bland, 124, note; *Rutland v. Yates*, 1 Bland, 465, note.

to such an officer according to the ancient course; as if the case had been referred to a master in chancery, or a special commission had been issued to take testimony and state an account: which, indeed, it is conceived, has been virtually affirmed by the act of assembly directing the appointment of an auditor, and authorizing him to administer an oath to all witnesses and persons proper to be examined upon such account. (k) Consequently, all the testi-

(k) 1785, ch. 72, s. 17.—CHESELDINE v. GORDON.—This bill was filed on the 14th day of December, 1740, by Kenelmn Cheseldine against George Gordon and Kenelmn C. Jowles, executors of George Forbes, deceased, and Ann Greenfield, executrix of Thomas T. Greenfield, deceased, and Dryden Forbes, executrix of Henry P. Jowles, deceased. The bill states that Kenelmn Cheseldine made his will, by which he made sundry devises, and appointed his wife, the plaintiff's mother, his executrix; and also appointed Thomas T. Greenfield, now deceased, and the testator of the defendant Ann, and Henry P. Jowles, now deceased, and the testator of the defendant Dryden, as guardians of the plaintiff, his son and heir—soon after which, he died seized and possessed of several tracts of land. That the plaintiff was then about four years of age, and his mother and George Forbes entered upon, or continued in possession of the lands which had so descended, or been devised to the plaintiff; but that soon after, Thomas T. Greenfield, the testator of the defendant Ann, and Henry P. Jowles, the testator of the defendant Dryden, forcibly took possession of all the lands which had so descended, or been devised to the plaintiff, and held possession thereof until after he attained his full age, and recovered the same, from those who claimed under them, by actions of ejectment. (*Cheseldine's lesse v. Brewer*, 1 H. and McH. 152.) That they sold timber from the land, and took all the rents and profits thereof without rendering any account whatever, or paying any thing for the same; or allowing any thing for the support and education of the plaintiff. Whereupon, it was prayed that the defendants might render an account of the rents and profits, and the interest thereof, which were or might have been of the plaintiff's lands; and that the plaintiff might be otherwise relieved in the premises according to equity.

The defendants answered separately, but all nearly to the same effect. They admitted that the said Kenelmn Cheseldine had made his will, appointing guardians to his pretended children; and soon after died seized of several tracts of land; but denied that he had, or could devise the lands in question to the plaintiff; because they were held by him, as devisee in tail, from his father, with remainder over, on failure of issue, to his three sisters; and, he dying without lawful issue, the lands passed accordingly to the testators of these defendants. They further admit, that when his alleged father died, he was about four years of age. These defendants in answer, say, that a certain Mary Sheppard, the complainant's mother, who lived at the house of his alleged father, at the time of his death, in a short time thereafter, removed from it, and quietly delivered possession of the house and plantation to Messrs. George Forbes, Henry P. Jowles, and Thomas T. Greenfield, on behalf of themselves, and their wives, the devisees in remainder, without any demand of dower, or other right therein; and that they entered upon, and took possession of the lands, and received the rents and profits accordingly. These defendants further admit, that the plaintiff brought an action of ejectment, and recovered as stated; but allege, that no actual marriage was proved on the trial in that action, to have been had between the said Mary Sheppard and the said Kenelmn Cheseldine, the puta-

mony collected and returned by the auditor in this case has been taken according to the long and well established course of the court.

tive father of the plaintiff: that it was given in evidence in that action, on the part of the defendant, that the minister of the parish, where the said Kenelm lived, several times admonished him and Mary for unlawfully cohabiting together; and thereupon he informed the minister, that he had been married to Mary by Parson Scott; who, on inquiry, declared he had not married them; and upon the said Cheseldine being told of it, and again admonished, he told the minister that they had been married by one Priest Gulick; who, upon inquiry, also declared, that he had not married them. Whereupon, the minister informed the governor, who ordered the then attorney-general to prosecute him: and he was accordingly presented for unlawfully cohabiting with the said Mary. Upon which a *venire facias* was issued against him to answer the presentment; but, that the attorney-general entered a *nolle prosequi*; and that during such unlawful cohabitation he had declared, he had intended to marry her, but thanked God he had not done so, swore he never would, and turned her out of his house, with the plaintiff in her arms; and declared, about five months before his death, she was not his wife; that after his death she went over to Virginia to procure a false certificate from Parson Breeton of his having married them; who declared he had not married them, and refused to give any such certificate. Yet, notwithstanding the proof of these and many other strong circumstances on that trial, the jury, by the great interest of the complainant, his attorney and others, brought in a verdict in favour of the complainant, contrary to the proof of the illegitimacy of the plaintiff; and judgment was entered up thereon. These defendants further admit, that their testators, and their wives had possession of the mansion-house and a part of the land, after the death of the plaintiff's father; that Dryden Forbes held another part of the land; and that Thomas T. Greenfield and his representatives, after his death, held another part of the land; but they do not know what, or whether any rents and profits were received by them, or any of them; nor do they know of any timber being sold from the land.

The plaintiff filed exceptions to the answer of each defendant for nearly the same causes. The exceptions to the answer of the defendant Gordon, were as follows: the complainant excepts to the answer of the defendant Gordon; *first*, for that the defendant, instead of answering the allegations contained in the complainant's bill, launches out into scandalous and personal reflections on this complainant, which are not examinable, or determinable in this honourable court; especially as this complainant's right hath been tried and determined according to the laws of the land; *secondly*, for that the answer of the defendant needlessly and uselessly asperses the memory and character of a gentleman who was attorney-general; and has been many years dead; which aspersions cannot possibly be examined into; nor can they possibly affect the merits of the cause, or answer any other justifiable purpose whatsoever; *thirdly*, for that the defendant only answers generally, that the several persons mentioned in the said answer, or some, or either of them, received the rents and profits of the said lands; but does not answer or set forth who received such issues or profits; how much they were, how much each tract was, or might have been rented, let, or leased for by the year, either positively or to the best of his knowledge, remembrance, or belief; all which ought to have been done; the same being required by the complainant's bill; and *fourthly*, for that it is alleged in the complainant's bill, that the several persons and defendants therein mentioned, made great profit and advantage by, and received great sums of money and tobacco

With regard to the taking of testimony under the authority of a special order of the court, before a justice of the peace, I have not

from the sale of timber from the said land and otherwise; to which the defendant hath not given any answer, although required so to do by the complainant's bill. The complainant, therefore, prays that the said defendant may amend his answer as to the same, and give in a full and sufficient answer to the complainant's bill of complaint.

At May term, 1745, the counsel for the defendants admitted the answers to be insufficient and imperfect in the several particulars excepted to; and therefore consented that the exceptions aforesaid be adjudged good and sufficient; and the answers insufficient in the particulars in the exceptions mentioned; and that the matters excepted to for scandal and impertinence be expunged; and the answers stand as to the other particulars; and the defendants pay the usual costs; and the scandal and impertinences contained in the said answers were accordingly expunged.

Upon motion of the counsel of the complainant, alleging that the scope of the complainant's bill was to have an account, and to obtain satisfaction for the rents and profits of his lands while they were unjustly withheld from him, together with the interest thereof; it appearing by the bill and answers, that the complainant's right to the said lands had been adjudged to him by due course of law; and therefore, that the only matter under consideration of this court, was the quantum of the rents and profits, and the interest thereof; and the loss sustained by the complainant by his lands being withheld from him; the case was submitted for a decree to account, &c.

27th May, 1746.—BLADEN, *Chancellor*.—The counsel on both sides being present, and the counsel for the defendants not objecting, but confessing to what was moved for on behalf of the complainant, this court doth *Decree*, that the Hon. George Plater, Esq. Messrs. Abraham Barnes, John Hicks, and James Mills, or any three or two of them, take an account of the issues and profits of the land mentioned in the bill of complaint, during the infancy of the complainant; and the time he was kept out of possession of the said lands; and, if need be, to examine evidences concerning the same; and return their proceedings thereon into the court, with all convenient speed.

Under which order, on the 23d of February, 1747, the following return was made, *to wit*: 'we the subscribers, three of the persons named in the order hereunto annexed, do in obedience thereto, humbly certify, that after due notice had been given to each and every of the defendants in the same cause, that we intended to meet at the house of the petitioner, situate on the premises mentioned in the bill of complaint, on Tuesday, the 26th day of January, instant, in order to execute the power given by the said order; and being so met; there were also Messrs. George Hamilton, who intermarried with the daughter of George Gordon, Kenelmn T. Greenfield, oldest son and heir at law of Col. Thomas T. Greenfield, and James Forbes only son and heir apparent of Mrs. Dryden Forbes, in whose presence and hearing were sworn, as evidences, Col. Jos. Jordan, Thomas Shanks, John Bond, John Hult, John Long, Jos. Shanks, John Boulton, Edmund Boulton, and Thomas Brewer, from whose several examinations it appears plainly to us, that the petitioner was out of possession of the land and premises, in his bill of complaint mentioned, from the spring of the year, 1718, to the latter end of October, 1739; during all which time the greatest and best part of the tract of land called Mattapony. was held and occupied by George Forbes, deceased, and the rents, issues and profits of the same;

been able to ascertain the origin of the practice ; but it seems to have prevailed from an early period of the provincial government ;

and the damage the said Kenelmn Cheseldine sustained thereby, is of the value of 61,500 lbs. of tobacco : and that the rest of the said tract of land, was held by Col. Henry P. Jowles, deceased, from the said spring of 1718 to the time of his death ; and by his widow after his death, until her intermarriage with a certain John Jowles, gentleman, deceased ; and after his death, by her again until the said October, 1739 ; and that the rents, issues, and profits of the same ; and the damage the same Cheseldine sustained thereby, is of the value of 1150 lbs. of tobacco per annum, amounting in the whole, to 23,000 lbs. of tobacco. And the island and tract of land called White's Neck, also mentioned in the same bill, were severally held and occupied for the same space of time by Thomas T. Greenfield, gentleman, deceased ; and after his death by Ann Greenfield, his widow, or by his or her under-tenants ; and that the rents, issues and profits of the same, and the damage the said Kenelmn Cheseldine sustained thereby was, and is of the value of 31,000 lbs. of tobacco. All which is certified by us, the subscribers, this 28th day of January, 1747. George Plater, Abraham Barnes, James Mills.'

May, 1748.—OGLE, Chancellor.—Decreed, that the said George Gordon, executor of the said George Forbes, one of the defendants, pay to the complainant 61,500 lbs. of tobacco out of the goods and chattels, which were of the said George Forbes, in his hands to be administered ; and that the complainant recover the same accordingly. And that Dryden Forbes, one other of the defendants, pay unto the complainant such part of the quantity of 23,000 lbs. of tobacco, as was received by the said Henry P. Jowles, her former husband, in his life time, out of the goods and chattels which were of the said Henry P. Jowles, remaining in her hands to be administered, if so much she hath ; and such part thereof as was received by the said John Forbes, her second husband, out of the goods and chattels which were of the said John Forbes, in her hands to be administered, if so much she hath ; and the residue of the said 23,000 lbs. of tobacco, which she received after the death of the said Henry P. Jowles, and before her intermarriage with the said John Forbes ; and so much thereof as she received since the death of the said John Forbes, out of her own proper goods and chattels, and that the complainant recover the same accordingly. And that the other defendant Ann Greenfield, pay unto the complainant so much of the 31,000 lbs. of tobacco, mentioned in the said return, as was received by the said Thomas T. Greenfield, her testator, out of his goods and chattels remaining in her hands to be administered, if so much she hath ; and the residue of the said 31,000 lbs. of tobacco, which she received since the death of her said testator, out of her own proper goods and chattels, and that the complainant recover the same accordingly. And it is further *Decreed*, that the complainant recover all his costs in this cause against the defendants out of the goods and chattels of their respective testators in their hands to be administered, if so much they have ; if not, that the complainant recover one-third part of the said costs of the proper goods and chattels of the said Dryden Forbes, and one-third part thereof of the proper goods and chattels of the said Ann Greenfield.'—*Chancery Proceedings, lib. J. R. No. 5. fol. 339 to 371.*

BARNEY v. HOLLINS.—4th January, 1810.—KILTY, Chancellor.—Decreed, that the parties account with each other concerning the partnership transactions of the said parties, under the firm of Barney and Hollins in the proceedings mentioned. That the auditor of this court state the account relative thereto, on the evidence in the cause, and such other evidence as the parties may produce to him, on notice as

and appears to have been at all times, and very commonly resorted to since the revolution; (*l*) and the court has gone so far as to compel a witness to submit to an examination before a justice of the peace, where testimony had been directed by an order to be so taken. (*m*) This mode of collecting testimony, it is believed, is

usual in such cases. The said account to be returned to this court for further order, and subject to the exceptions of either party. The Chancellor has to remark, that the taking of further evidence by the auditor, after the decree to account, appeared to be the practice; and has so continued since his coming into office. M. S.

(*l*) The State v. Brooke, ante 42 note.—COCKEY v. CHAPMAN, 10th February, 1729, Injunction bill; answer filed; motion to dissolve the injunction this court; ruled motion to dissolve the injunction 21st February; on motion of the defendant's counsel, and hearing what was alleged by the counsel of both sides, ruled that injunction be dissolved.

After which, the plaintiff by his petition stated, that his injunction had been dissolved, as he understood, upon the ground, that he had not paid certain fees to the sheriff, &c. Whereupon he prayed, that another injunction to stay execution against him, upon his giving security to pay the execution fee in case the court, at the hearing, should decree the same to be due.

16th March, 1729.—CALVERT, Chancellor.—Having heard the arguments of both parties, in relation to the subject matter of this petition, it is *Ordered*, that the hearing of the cause between Chapman and Cockey be on the 11th of April next, being the Saturday before the assizes in Anne Arundel county. And that any depositions taken before Mr. Beale, or any other magistrate of the city of Annapolis, in relation to this cause, be allowed as evidence upon the hearing. It is further *Ordered*, that injunction issue in the mean time, upon giving security. And, in case any execution is issued and executed, the goods to be stayed in the sheriff's hands till hearing the cause.

Injunction issued accordingly. After which, the plaintiff filed his bill, setting forth his case in due form and at large. To which bill the defendant put in his answer; and the case was thus brought before the court on bill and answer alone, on the day appointed.

11th April, 1730.—CALVERT, Chancellor.—*Decreed*, that the injunction prayed for in the bill, be perpetual. And it is further *Ordered*, that the sheriff of Anne Arundel county, restore to the complainant the negroes taken from him in execution. *Chancery Proceedings, lib. J. R. No. 2, fol. 13, 16, 24.*

(*m*) ONION v. McCOMAS.—This bill was filed on the 17th of November, 1800, by John B. Onion, against William McComas and Thomas R. Smith, to obtain an injunction to stay proceedings at law, on a judgment rendered in favour of the defendant McComas, for the use of the defendant Smith, on a bond as assignee thereof from the defendant McComas, against the plaintiff; and for general relief, &c. The injunction was granted as prayed; and the defendant McComas having put in his answer, and given notice of a motion to dissolve the injunction, the matter was accordingly brought before the court.

2d February, 1802.—HANSON, Chancellor.—The motion to dissolve the injunction in this cause issued, being submitted, the bill and the answer of McComas, and the exhibits referred to, as parts of the bill and answer, were by the Chancellor read and considered.

peculiar to our chancery proceeding, for I have met with no mention of any such practice in the English books. It is, however,

The bill and the answer are both so drawn, that it is difficult to determine whether or not McComas has denied the equity stated in the bill. However, it appears from the bill material, for the complainant to get an answer from Smith. As that answer has not been given, and as Smith appears from the proceedings, to be the defendant alone interested, at this time, in the judgment obtained against the complainant; it is *Ordered*, that the injunction be continued until the final hearing or further order.

After which, the defendant Smith put in his answer; and gave notice of a motion to dissolve the injunction at the next term, when the matter was brought before the court.

2d July, 1802.—HANSON, *Chancellor*.—The Chancellor having considered the answer of Thomas R. Smith; and the said Smith not denying the material facts stated in the bill; it is *Ordered*, that the injunction heretofore issued in this cause, continue until final hearing, or further order.

After which, the case was again brought before the court.

20th July, 1802.—HANSON, *Chancellor*.—The Chancellor has twice considered this case, and each time on a motion to dissolve; the two answers having been filed at different times.

It appears, on account of some peculiar circumstances stated in, or collected from the proceedings, that each party should be desirous of having the cause speedily decided on its merits. What proceeding is first to be had for that purpose, may possibly be doubtful to the counsel. The Chancellor conceives, that the best thing to be done for both parties, would be to have an order to state an account between Onion and McComas, as matters stood on the day of the assignment of the bond; and likewise as they stand at this time, without regarding the assignment of the bond to Smith; and for the auditor to examine witnesses, if any shall be produced; for the said account, when stated, to be liable to exceptions; and the question, or questions of equity are reserved.

The Chancellor thinks it much better to have such an order by consent, than to issue a commission, on application, and on his own authority, for taking depositions; and he is positive, that neither party, if desirous of a speedy decision on the real merits of the cause, will reject his proposal. If they shall agree to it, let them, or their solicitors, or either of them; and the solicitor of the other, sign the writing subjoined.

We consent, that an order pass conformably to the foregoing recommendation or proposal of the Chancellor. This writing was signed accordingly.

Sundry depositions having been taken and returned, the case was submitted for a final determination.

12th November, 1804.—HANSON, *Chancellor*.—The papers in this cause have often been laid before the Chancellor, and as often he has acted on them, as his judgment dictated. They are now laid before him, as for a final decision, depositions having been returned.

The Chancellor refers to his remarks and propositions of July 20th, 1802, which appear to have been agreed to by the counsel. Agreeably to that proposition and agreement, as soon as the depositions were returned, they ought to have been laid before the auditor. After lying several terms in the office, the papers are now laid

not only in some respects, the cheapest form of gathering proofs, but, in many instances, it greatly facilitates, and expedites the progress of the cause. Depositions so taken, it is evident, are made under all the principal safeguards, which can, in any manner, insure fairness and fulness of evidence; that is, the special order of the court indicating the matter in issue, on oath, publicity, the right to cross-examine, and a penal responsibility. It may, therefore, be as confidently relied on as testimony taken in any other way; being in no manner open to the strong objections to that kind of *ex parte*, affidavit evidence, to which the Court of Chancery of England allows itself to resort, for the determination of some of

before the Chancellor instead of the auditor. But whether or not they ought to have been laid before the auditor, the Chancellor now thinks proper to order; and it is *Ordered*, that, from the aforesaid depositions, and other proceedings, the auditor of this court, state and report an account, or accounts, agreeably to the said propositions and agreement of July 20th, 1802.

The defendants, by their petition stated, that in pursuance of this order, of the 12th of November, the auditor had summoned Hannah Marches to appear before him, at his office, on the 28th of the same month, to testify on their behalf, which she had not done. Whereupon they prayed for an attachment, &c.

2d December, 1805.—HANSON, Chancellor.—*Ordered*, that, unless Hannah Marches, of Baltimore, shall, on the 13th day of this month, appear before Samuel W. Lee, a justice of the peace of Baltimore county, and answer such interrogatories as shall be proposed by either, or any of the parties to this cause, she shall be considered as acting in contempt of this court; and an attachment shall forthwith issue against her; provided a copy of this order be served on the said Hannah Marches before the 11th instant.

The defendants, by their petition stated, that the witness Hannah Marches had appeared before the justice of the peace as required; but, that she had not given a full answer to the interrogatories exhibited to her by the petitioners. Whereupon they prayed for an attachment, &c.

21st December, 1805.—HANSON, Chancellor.—*Ordered*, that unless Hannah Marches, lately Hannah Onion, shall, before the 25th day of January next, appear before some judge, or justice of the peace, and give a plain, full, and direct answer to the second interrogatory, on the 13th instant proposed to her, and evasively answered in the presence of Samuel W. Lee, a magistrate, an attachment of contempt, on application, shall be issued against her, returnable immediately: *Provided*, a copy of this order, and of the said interrogatory be served on her at any time before the 10th day of January next; and provided too, that the paper marked No. 1, be shewn to her at the time of her appearing to answer as aforesaid. The said interrogatory and the answer thereto have been laid before the Chancellor. The answer to the second interrogatory is defective and evasive, inasmuch as she does not say whether or not the name 'Hannah Onion,' signed to the said paper marked No. 1, shewn to her, at the time of exhibiting said interrogatory, is her hand-writing.

the most delicate and important cases that are brought before it. (*n*) It is upon these grounds, that I think this mode of taking testimony deserves the continued sanction, approbation, and protection of this tribunal. (*o*)

The testimony taken under the order of the 21st of February, 1828, before a justice of the peace, has therefore, been brought in according to the regular course of the court.

The will of the late *William Duncan*, it appears, has been proved and recorded, according to the act of assembly, which declares, 'that it shall and may be lawful for the judge of probate of wills to take the probate, or cause to be proved any last will or testament within this province, although the same concerns titles of lands;' (*p*) which for this purpose is still in full force. A probate so made of a will devising real estate, it has always been held, is at least *prima facie* evidence of its validity; (*q*) and there being in this case, no allegation or evidence, which, so far questions the validity of this will, as to throw the burthen of sustaining its verity upon the plaintiffs; and these infant defendants as well as the plaintiffs claiming under it, the certified copy offered must be considered as sufficient, for all the purposes for which it is produced.

From the pleadings and proofs it is very clear, that this will cannot be so construed, as to authorize a sale of the real estate for

All the testimony, required by the parties, having been taken and returned; the auditor having stated and reported accounts as required; to which exceptions were filed; and the case having been set down for hearing, it was brought before the court.

28th December, 1807.—KILTY, Chancellor.—The object of the bill, in this case, was to obtain an allowance of certain payments and discounts, against a judgment obtained by McComas for the use of Smith, on a bond given by Onion; and to obtain an injunction against the said judgment; and also for general relief.

The Chancellor has considered the exceptions to the auditor's report, and is of opinion, that they ought to be overruled, and that it ought to be and is hereby confirmed—Whereupon it is *Decreed*, that the injunction heretofore issued in this case be perpetual; and that the defendant William McComas, pay to the complainant John B. Onion, or bring into this court to be paid to him, the sum of £1324 5s. 6d. with interest thereon from the 28th day of August, 1806, until paid; and that the defendant Thomas R. Smith be dismissed. The parties respectively to pay their own costs.—M. S.

(*n*) *Wellesley v. The Duke of Beaufort*, 3 Cond. Chan. Rep. 1; *Park's His. Co. Chan.* 441.—(*o*) *Winder v. Diffenderffer* order, 4 May, 1829, post.—(*p*) 1715 ch. 39, s. 2.—(*q*) *Carroll's lessee v. Llewellyn*, 1 H. & McH. 162; *Smith's lessee v. Steele*, 1 H. & McH. 419; *Massey v. Massey*, 4 H. & J. 142; *Darby v. Mayer*, 10 Wheat. 465; Since so expressly declared by 1831, ch. 315, s. 1.

the purpose of raising or securing the payment of this annuity; nor can it be construed to give the plaintiff *Anna Maria* an estate for life, or any other lesser estate in the lands charged with the payment of the annuity. These infant devisees could only take this estate subject to the charge upon it, and the annual rents and profits, as it is now shewn, so far exceed the annuity in amount as to demonstrate, that it is much to their benefit so to take it. And consequently, all their property, in respect of this large amount of assets thus placed in their hands, and which they have taken, must be held liable for the payment of this annuity.

For the arrears which accrued since the death of the testator, and were left unpaid by *Deborah Duncan*, the late guardian of these infants, her sureties as guardian, if she gave any, or her legal representatives may be held liable; but their estate is liable to these plaintiffs, to whom the sureties or legal representatives of the late *Deborah Duncan* can, perhaps, be in no way held accountable; certainly not in this suit. The present guardian of these infant defendants, *Joseph Robinson*, not having answered; and having thereby tacitly admitted, that he had received a sufficiency of rents and profits from his ward's estate, must be held absolutely liable for the whole amount of the annuity which has accrued and been left unpaid, during the time of his guardianship. For the purpose of having a statement made upon these principles, the case must be again sent to the auditor.

Ordered, that this case be, and the same is hereby again referred to the auditor, with directions to state an account, shewing the amount of the arrearages of the said annuity which became due during the life time of the late *Deborah Duncan*; after giving her credit for the sum of \$20, as of the year 1821, in addition to the credits heretofore given. And further, to state an account of the amount of the arrearages of the said annuity, left unpaid by the present guardian, the defendant *Joseph Robinson*.

On the 13th of August, 1829, the auditor reported, that he had in obedience to this order, again examined the proceedings, and stated, *first*, an account between *Deborah Duncan*, deceased, and the complainants, in which was charged the arrearages of the complainant's annuity to the supposed time of *Deborah Duncan's* death. That the proof was, that she died in the latter end of the year 1824; upon which he had assumed, as a mean period, the 4th of October of that year. That he had allowed a credit for

\$20, paid on account of the annuity accrued on the 4th of March, 1821, agreeably to the said order. That interest was charged on the annual arrearages from the 4th of March of each year. And that the sum due to the complainants, was \$354 16, with further interest on \$255, part thereof, from that date until paid. And *secondly*, an account between *Joseph Robinson* and the complainants, of arrearages accrued since the death of *Deborah Duncan*. That interest was there also allowed on the annual arrearages, as in the first account. And that there appeared to be due to the complainants on this account, the sum of \$93 26, with further interest on \$85, part thereof, from that date until paid. Upon which report the case was submitted by the solicitors of the parties for final adjudication.

17th August, 1829.—BLAND, *Chancellor*.—DECREED, that the said bill of complaint be and the same is hereby taken *pro confesso*, as against the defendant *Joseph Robinson*. And it is further *Decreed*, that the infant defendants *Caroline Duncan* and *William J. B. Duncan*, or the said *Joseph Robinson* as their guardian out of the estate and property of his said wards, now in his hands, or which may hereafter come into his hands, pay unto the plaintiffs *Perry Townshend* and *Anna Maria* his wife, or bring into this court to be paid to them, the sum of \$354 16, with interest on \$255, part thereof, from the 13th instant, until paid or brought in. And it is further *Decreed*, that the said *Joseph Robinson* also pay unto the plaintiffs *Perry Townshend* and *Anna Maria* his wife, or bring into this court to be paid to them, the sum of \$93 26, with legal interest on \$85, part thereof, from the 13th day of the present month, until paid or brought in; together with the costs of this suit, to be taxed by the register; the same to be paid by the said *Robinson*, out of the assets of his said wards in his hands, if any there be, if not out of his own proper estate and effects. And it is further *Decreed*, that the several reports of the auditor, heretofore made in this case, so far as they accord with this decree, be and the same are hereby confirmed; and so far as they are at variance with this decree, they are hereby rejected. And it is further *Decreed*, that the said complainants' bill of complaint, as against the defendant *John Iglehart*, be and the same is hereby dismissed with costs, to be taxed by the register.

Appeal.—See the decision of the Court of Appeals, 3 *Gill and John*. 413.

BOARMAN'S CASE.

Upon a petition and certificate, that a person is of unsound mind, a writ *de lunatico inquirendo*, may be granted—a committee appointed of the person and estate of the lunatic, without account; upon condition of maintaining him, returning an inventory, &c.—a runaway slave belonging to a lunatic may be sold to prevent a loss—where two or more persons are appointed as a joint committee of a lunatic, the trust ceases by the death of any one of them—a person, not a resident of the state, should not be appointed committee of a lunatic—on the death of the lunatic the court can only deliver itself of the lunatic's estate, without determining on the claims of his creditors, or next of kin.

John Manning and *Mary Ann*, his wife, by their petition stated, that *Mary Ann* was one of the presumptive heirs at law of *Cornelius Boarman*, then a resident of Prince George's county, who was seized in fee simple of a valuable real estate in Charles county; and possessed of a large personal estate, more than adequate to his maintenance; that he had, by the visitation of God, been deprived of his understanding; and, for several years past, had not enjoyed any, or but very few lucid intervals of reason. Whereupon the petitioners prayed, that a writ *de lunatico inquirendo* might issue; that a committee might be appointed, &c. With this petition were filed two certificates, stating, that *Cornelius Boarman* was believed to be a lunatic.

26th April, 1797.—HANSON, Chancellor.—When this petition shall have been duly filed, issue a writ agreeably to its prayer, to Prince George's county.

The writ *de lunatico inquirendo* was accordingly issued; and an inquisition had and returned; by which it was found, that *Cornelius Boarman* was then a lunatic of an unsound mind; and did enjoy lucid intervals; but not so as that he was capable of the management of himself and his property; and that he was seized in fee simple of a tract of two hundred acres of land in Charles county, with a number of negro slaves, and other personal property as therein specified, &c.

7th February, 1798.—HANSON, Chancellor.—Ordered, that the care, custody, and charge of the person, and of the estate, real and personal, of *Cornelius Boarman*, a lunatic, be and it is hereby committed unto *John Manning*, husband to *Mary Ann Manning*, one of the presumptive heirs of the said lunatic; and, that until the further order of the Chancellor, the said *John Manning* shall use the

said estate as his own, without rendering any account of the profits thereof; (a) in consideration of his taking care of the person of the lunatic, and providing him clothing and complete maintenance, and every necessary to his comfort and subsistence, according to his estate and condition: provided, that before the said *John Manning* shall act as trustee aforesaid, he shall file with the register of this court, a bond to the State of Maryland, executed by himself, and a surety or sureties, approved by the Chancellor, in the penalty of £2000, conditioned for the faithful performance of the trust reposed in him by this order, according to the tenor thereof; and for returning to this court within six months from the date thereof, an inventory of the real and personal estate of the said lunatic, which shall come into his hands, or be known to, or discovered by him; and for delivering the same up, agreeably to the Chancellor's order, whenever for that purpose passed. *Ordered* further, that when the said *Manning* shall enter upon his trust, he shall make sale of the perishable articles of the said personal estate; and report the same to the Chancellor, in order that he may either ratify or set aside the same.

This trustee gave bond accordingly; and returned an inventory of the property of the lunatic, which had come to his hands. Some time after which, he stated by his petition, that negro *James*, the property of the lunatic, had frequently absconded from service, and had several times nearly effected his escape; and by so doing had become of little use, and was in great danger of being totally lost. Whereupon the petitioner prayed, that he might be authorised to sell him, &c.

7th June, 1805.—HANSON, *Chancellor*.—*Ordered*, that the trustee of the said lunatic, viz. the said *John Manning*, be and is hereby authorised to sell a certain negro belonging to the said lunatic, called *James*; the purchaser of the said slave paying immediately the consideration, or giving bond with surety to the said trustee as such for paying the same with interest, within one year from the

(a) The Chancellor of England cannot grant a lunatic's estate without account; but the Chancellor there, may make what allowance he pleases for the maintenance of the lunatic, as supposing the estate to be £500 per annum, or £1000, he may allow as great a salary as the income of the estate amounts to; so that, in some cases, where the income is very narrow, the whole may be deemed little enough. *Sheldon v. Fortescue Aland*, 3 P. Will. 110; *Lysaght v. Royse*, 2 Scho. and Lef. 153; In the matter of *Fitzgerald*, 2 Scho. and Lef. 436; *Shelford on Lunatics*, 215.

time of sale. And the said trustee, as soon as conveniently, may be after the sale, shall return to the Chancellor an account of the sale, in order that the same shall be ratified or otherwise, as to the Chancellor shall seem proper. And upon obtaining the Chancellor's ratification; and on receipt of the purchase money, and not before the trustee shall, by a good deed, convey the said slave to the purchaser.

James Boarman by his petition, filed on the 26th of June, 1810, stated that the trustee *John Manning* had been then dead about two years, of which the petitioner, as one of the relations of the lunatic, considered it his duty to inform the Chancellor, and to pray, that another trustee might be appointed. Subjoined to this petition was a certificate, by a solicitor of the court, that the petitioner was one of the relations of the lunatic named in the inquisition; and that he was a fit person to be appointed trustee.

27th June, 1810.—KILTY, Chancellor.—Ordered, that the within named *James Boarman*, be appointed trustee in the place of *John Manning*, deceased; and that he give bond in the same sum as was directed as to *Manning*, and have the same powers.

Mary Ann Manning and *Ignatius Manning*, by their petition, on oath, filed on the 20th of July, 1810, stated that the trustee *John Manning*, had died some time in January, 1809; but, under an impression, that *Mary Ann* had been appointed a trustee jointly with him, she had ever since continued to act as such, until she had learnt, that *James Boarman* had privately filed his petition, and caused himself to be appointed trustee, without imputing any misconduct to these petitioners; that the lunatic was a nephew of *Mary Ann*; and had long been under her care, so that she was better acquainted with the proper mode of treating him than any other person, and had some influence over him; that the other petitioner was her son, and lived on the same tract of land, immediately adjoining to hers, and would render every assistance in his power. Whereupon, they prayed that they might be jointly appointed trustees, &c.

13th November, 1810.—KILTY, Chancellor.—A petition was presented in July last by *Mary Ann Manning* and *Ignatius Manning*, to be appointed trustees for the lunatic, for whom the above named *James Boarman* had been appointed, which has laid in the office to be decided on when the said *James Boarman* should offer

his bond; but the bond not having been offered by him, and it being necessary that some effectual appointment should be made, it is *Ordered*, that the appointment of *James Boarman*, be, and the same is hereby revoked. (b)

The appointment of *James Boarman* being this day revoked for the reasons therein mentioned, it is *Ordered*, that the petitioners *Mary Ann Manning* and *Ignatius Manning* be, and they are hereby appointed trustees in his place; and that they give bond in the same sum as was directed as to *John Manning*, and shall have the same powers. The bond to be filed before the first of January next.

These trustees gave bond accordingly, and took upon themselves the care and management of the lunatic and his estate; and on the 21st of December, 1810, returned an inventory of his property, from which it appeared, that in addition to the other property therein described, they then had in hand the sum of £353 7s. 0d. After which, the matter was, by motion, again brought before the court.

21st December, 1810.—KILTY, Chancellor.—The order of the 7th of February, 1798, to remain in force as to the present trustees, who were appointed on the 13th of November last; except as to the last part, until further directions shall be given.

James Boarman by his petition, filed on the 4th of January, 1815, stated that the lunatic's estate consisted of about two hundred acres of land and upwards, of thirty negroes, about seventeen of which were working hands; that he was satisfied, from his own observation, and the best information he could obtain, the product of his estate was far beyond the necessary expenditure for his maintenance, even should it have been thus applied; but that the trustees have inhumanly and shamefully neglected to furnish him with the comforts of life, by withholding from him such clothing as was almost indispensable to his existence; and also by placing him in a house not fit for his residence; and leaving him, unattended, to the great danger of his personal safety, if not of his life; that the trustee *Mary Ann Manning* was a very old and infirm woman, and entirely incapable of attending to the well being of the lunatic. Whereupon, the petitioner prayed, that he, or some other suitable person might be appointed trustee, &c.

4th January, 1815.—KILTY, Chancellor.—The register is directed to file the within petition, and to issue *subpœnas* to *Mary Ann Manning* and *Ignatius Manning*, returnable to February term next; at which term a further order will be made for procuring testimony and hearing the petition.

To this petition the trustee *Ignatius Manning* put in his separate answer, on oath, in which he positively denied the charge of neglect and of inhuman or cruel treatment of the lunatic; and averred, that he had been always treated with all the humanity and care which could be bestowed; and that he had had every comfort a man in his situation could have, and had lived in a house very near to, and spent most of his time in the same house with the other trustee *Mary Ann* and her son *John H. Manning*, who had bestowed great care and attention upon him. This respondent admitted, that the other trustee, his mother, was old and infirm, and had not had the management of the trustee's estate; and this respondent further stated, that the lunatic's lands were only tolerably good; that the greater proportion of his negroes were young and unprofitable, so that the annual proceeds of the whole estate had not been more than sufficient to maintain the lunatic, and rear his negroes; and that the increase of the negroes constituted the chief or only enhancement in the aggregate value of the estate; that if the negroes were to be hired out and dispersed, they might run away, and be wholly lost; he therefore suggested the propriety of having them sold, and the proceeds invested in some public funds, &c.

After which the trustees, by their petition stated, that the produce of the lunatic's estate was scarcely sufficient to maintain him and his slaves; that the situation of the lunatic was such as to make it very difficult to take care of him, unless he was placed in a hospital; and that it would be more to his advantage, that his negroes should be sold, and the money vested in some productive fund; and that his lands should be rented.—Whereupon they prayed, that they might be authorized to sell the negroes and invest the proceeds, and to place the lunatic in a hospital, &c.

16th March, 1815.—KILTY, Chancellor.—The above petition cannot be acted on until the question arising on that of *Boarman's* is decided; the time for which must depend on either of the parties applying for a hearing.

After the death of *Mary Ann Manning* the matter was again brought before the court by motion.

20th November, 1820.—KILTY, Chancellor.—Ordered, that *John H. Manning* be, and he is hereby appointed co-trustee, in the place of *Mary Ann Manning* deceased, with *Ignatius Manning*; the two to give bond as before directed, and the former orders to remain in force.

These trustees gave a joint bond accordingly. And on the 9th of July, 1824, *James Boarman*, by his petition stated, that the estate of the lunatic was very productive, and more than sufficient to support him in every comfort and luxury; but that the trustees had treated him with great unkindness, although he was very mild and inoffensive in his conduct; and they had kept him in an out-house, which was not sufficient to protect him from the weather; and with not enough clothing, even of the coarsest kind, to shield him from the weather, not even enough to cover his body and conceal his nakedness; that the petitioner is one of the next of kin of the lunatic, in the same degree as the trustees. Whereupon the petitioner prayed, that the trustees might be ordered to return an inventory of the lunatic's estate as required by the previous order of the court; to render an account, and to invest the surplus of the profits of the estate in some fund, for the benefit of those who may be entitled after the death of the lunatic; that the petitioner or some other suitable person be appointed in place of the present trustees; and that a *subpœna* issue, &c.

15th July, 1825.—BLAND, Chancellor.—Ordered, that the register issue *subpœnas* to *John H. Manning*, and *Ignatius Manning*, of Prince George's county, as prayed, returnable to September term next; when an order may be passed for taking testimony and the hearing of the petition.

James Boarman by his petition, on oath, filed on the 11th of April, 1826, stated, that the trustee *John H. Manning* was dead; that the other trustee, *Ignatius Manning*, since the return of the last process had removed out of the state; and that the estate of the lunatic laid immediately in his vicinity. Whereupon he prayed, that he might be appointed trustee, &c.

11th April, 1826.—BLAND, Chancellor.—On considering the petition of *James Boarman*, filed this day; and it appearing by the return of the sheriff on the *subpœnas* issued in pursuance of the

order of the 15th day of July last, that *John H. Manning*, one of the trustees, is dead; that *Ignatius Manning*, the other trustee, now resides out of the state, (c) and that the grant or appointment made by the orders of the 13th of November, 1810, and of the 20th of November, 1820, were joint, a mere authority without any interest, which determined by the death of one of the trustees. (d) It is therefore *Ordered*, that the appointment of the said *Ignatius Manning* as trustee of the said lunatic, be and the same is hereby annulled.

And it is further *Ordered*, that the care, custody, and charge of the person and of the estate, real and personal, of the said *Cornelius Boarman*, a lunatic, be and they are hereby committed unto *James Boarman*, of Charles county, one of the next of kin of the said lunatic: provided, that before the said *James Boarman* shall act as trustee as aforesaid, he shall file with the register a bond to the state, executed by himself, and a surety or sureties, to be approved by the Chancellor, in the penalty of ten thousand dollars, conditioned for the faithful performance of the trust reposed in him by this order; and for returning to this court, within six months from the date thereof, an inventory of the real and personal estate of the said lunatic which shall come to his hands, or be known to, or discovered by him; and for delivering the same up agreeably to the Chancellor's order; and to account for the proceeds of the same to the lunatic's use, and in such manner as the Chancellor shall direct by any future order.

The trustee *Boarman* gave bond accordingly. Soon after which, *Ignatius Manning* by his petition, on oath, stated, that he had resided within the District of Columbia ever since the year 1817, which fact was well known to the Chancellor when he passed the order of the 20th of November, 1820; that the lunatic then occupied the same house in which he had resided for the last thirty years, and which was then every way good, sufficient and suitable for him; that he was taken great care of by the petitioner's brother, to whom he was attached; that the conduct of the petitioner, in relation to the lunatic and his estate, had been in all respects fair and upright; that having been authorized by the previous orders of this court to use the lunatic's estate as his own, the

(c) *Ex parte* Ord, 4 Cond. Chan. Rep. 44—(d) *Ex parte* Lyne, Cas. Femp. Talbot. 143—*Ex parte* Clarke, 4 Cond. Chan. Rep. 279.

order of the 11th of April last operated oppressively upon him, inasmuch as he had commenced and was then carrying on a crop with the negroes; that *James Boarman* was a man of bad character; and, his sureties, although respectable men, were not sufficient for the purpose. Whereupon this petitioner prayed that the order of the 11th of April last might be rescinded, &c.

28th June, 1826.—BLAND, *Chancellor*.—*Ordered*, that the matter of the said petition be taken up, considered and decided upon, and the order of the 11th of April last, be rescinded, on the 26th day of July next, unless good cause to the contrary be then shewn: Provided, that a copy of this order, together with a copy of the said petition, be served on the said *James Boarman* on or before the 12th day of July next. And it is further *Ordered*, that the order of the 11th of April last be, and the same is hereby suspended until further order.

James Boarman put in his answer, on oath, in which he again urged, that the trustee *Ignatius Manning*, was a non resident, without denying, that the fact had been made known to the Chancellor when the appointment was made, as was alleged; that this respondent's character was good; that the trustee *Ignatius Manning* had neglected his duty, &c. Whereupon this respondent prayed, that the order of the 28th of June last, might be revoked; that the trustee *Ignatius Manning* might be ordered to render an account, &c.

After which, *James Boarman*, by his petition, stated, that the lunatic *Cornelius Boarman* was dead; and that he had obtained letters of administration upon his estate. Whereupon he prayed, that the trustee *Ignatius Manning* might be ordered to render a full account; and that the petitioner might have such other relief as was suited to the nature of his case.

6th February, 1829.—BLAND, *Chancellor*.—*Ordered*, that the said *Ignatius Manning* render a full and true account, on oath, of all his proceedings as trustee of the late *Cornelius Boarman*, as prayed, on the 12th day of March next, or show good cause to the contrary: provided, that a copy of this order, together with a copy of the said petition, be served on the said *Manning* on or before the second day of March next.

This order not having been served in time, it was, on motion, renewed, the time of service enlarged, and the first of June then next appointed as the day to show cause.

The trustee *Ignatius Manning* put in his answer on oath, as required, in which he stated, that he had delivered over to the administrator of the late lunatic, all his personal estate, except the one-third part of the sum of £353 7s. 0d. which could be deducted from the proportionate part of the said lunatic's estate, due to this respondent as one of his heirs, &c.

After which, the administrator *Boarman*, by his petition stated, that the personal estate of his intestate had been sold under an order of the Orphans' Court; that *Ignatius Manning* had purchased to a large amount at that sale; and that no distribution could be made of the intestate's estate but by his administrator. Whereupon he prayed, that the trustee *Ignatius Manning* might be ordered to pay, or bring into court the sum of £353 7s. 0d. for which he had admitted himself to be accountable, &c.

15th June, 1829.—BLAND, Chancellor.—Ordered, that the said *Ignatius Manning* forthwith pay unto the petitioner *James Boarman*, as the administrator of *Cornelius Boarman*, or bring into this court the sum of £353 7s. 0d. together with legal interest thereon, from the first day of the present month; the said *Ignatius* having then failed fully to account, or show good cause as directed by the order of the 6th of February last.

This order having been served, and not having been complied with, on application, an attachment was ordered. After which, the trustee *Manning* by his petition stated, that the sum of £353 7s. 0d. had come to the hands of his father, who was the first trustee, and on his death it had been, by his direction, and with consent, distributed among his three sons, as the next of kin of the lunatic, who would be entitled to it after his death; so that no more than one-third part of that amount had ever, actually, come to the hands of this trustee; that he had consented to this arrangement; and now deemed it admissible, because he and his brothers, among whom it had been divided, were, as the lunatic's next of kin, entitled to a distributive share of his estate, much larger in amount than the sum of money thus returned. Whereupon the petitioner prayed, that the amount might be discounted from the distributive shares of the intestate's estate, to which they were entitled, or that all further proceedings in this court might be suspended until a settlement could be had with the Orphans' Court, &c.

1st August, 1829.—BLAND, Chancellor.—The petition of *Ignatius Manning* having been submitted, the proceedings were read and considered.

It is perfectly clear, from the proceedings, that *Ignatius Manning* is chargeable with the sum of £353 7s. 0d. which he has, or ought to have in his hands, as a part of the late lunatic's estate. On the death of the lunatic, the jurisdiction of the Chancellor over his estate immediately ceased for every purpose whatever; except that of calling the trustee to account, and directing him to hand over all the property of the deceased lunatic to his legal representatives; so that this court might, without delay, completely deliver itself of the whole subject of which it had taken charge. (e)

But if this court were to continue its authority over the estate of the deceased lunatic, for the purpose of ascertaining the proper discount to which the trustee was entitled, as next of kin, or creditor other than as trustee, there would be scarcely a single instance in which, upon the death of a lunatic, who had been under the care of this court, that the administration and distribution of his estate would not be thrown upon this court, instead of the Orphans Court, which has been, in so especial a manner and in general, clothed with jurisdiction in all matters relative to the administration and distribution of deceased persons' estates; since it must very often happen, that a trustee may have such a claim as this upon the estate of the deceased. Such a course of proceeding, as a continuation of the jurisdiction in lunacy, cannot be allowed. But there may be circumstances in which a bill may be filed by a next of kin, or a creditor of the deceased lunatic against his administrator and trustee for the administration and distribution of his estate, in which the trustee may be ordered to account in that cause; and upon such account may have all just allowances made to him. (f) Here, however, the matter is presented in an entirely different form.

A trustee of a lunatic is an agent of the court, who must be held strictly accountable; and who must hold himself at all times ready to account, to deliver the property, and to pay the money in his hands, as ordered by the court, without the least delay.

Whereupon it is *Ordered*, that the said petition be and the same is hereby dismissed with costs.

After which, on motion of *Ignatius Manning* in proper person, the attachment not having been served upon him, the matter was again brought before the court.

(e) 2 Harr. Pra. Chan. 122; Shelford on Lunatics, 208; *Ex parte Clarke*, 4 Cond. Chau. Rep. 276. (f) *Wigg v. Tiler*, 2 Dick. 552; Shelford on Lunatics, 213.

5th September, 1829.—BLAND, *Chancellor*.—Ordered, that the Register be and he is hereby directed to receive from the said *Ignatius Manning*, the sum of £353 7s. 0d., with legal interest due thereon, and deposit the same in the Farmer's Bank of Maryland in the usual manner, subject to the further order of this court; that sum with interest being the amount ordered to be paid, or brought into court by the said *Manning* by the order of the 15th day of June last; and the register is further directed, on receipt of the said sum of money, to give the said *Manning* a receipt in full for the same in discharge of the said order.

After which, on the application of the administrator, *James Boorman* the whole amount, so brought into court was paid to him; and thus this court finally delivered itself from all further concern with the estate of the deceased lunatic.

BINNEY'S CASE.

When an attachment is in the nature of mesne process, the Sheriff may take bail for the party's appearance; and on a return *cepi*, the sheriff may be ordered to bring in the body; or he may sue upon the bail bond. It is the better mode, in most cases, to decide on the motion to dissolve the injunction, before an attachment for the breach of it is disposed of.

The court frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things, that occasions the application; but, in most cases, to obtain an injunction, it is sufficient, that the question is important and doubtful. In some cases the injunction is granted by a special order, allowing a motion to dissolve, to be heard at an early day. The making of a substantial amendment dissolves the injunction of course, unless expressly saved. An answer, which purports to be the answer of several; but is not sworn to by all of them, may be taken off the file; or considered as the answer of him only who has sworn to it. A defendant may sufficiently answer, by adopting the answer of his co-defendant.—No one is a party to the suit against whom no process is prayed.—A misnomer may be waived, but if relied on, it is fatal.

Where the legal capacities of parties, as charged, are different; such capacities must be considered as if they were different persons.—A corporation can only be called on to answer by its proper name.—All corporations are subject to a visitatorial power; or to some legal control.—In general, a corporation may alien all, or any of its property at pleasure.

A natural mill-site described.—It is not illegal to erect a new mill near to, and in rivalry of an old one.—The power conferred on the Potomac Company in regard to mills considered.—The nature and application of a presumption of right as to certain mill-sites.

The Potomac river belongs entirely to Maryland—above tide, it was not originally deemed a navigable river; but has been made so, in a qualified manner, by law.

A grant of the power of *eminent domain* is one which must be construed strictly ; it cannot be exercised for any but a public purpose ; and, in general, does not admit of any repetition. The jurisdiction of this court in regard to persons or things not within the state ; and the uncontrolled concurrent jurisdiction of the judiciary of this state, with that of the neighbouring states, in some peculiar cases.—The estate in a canal, being in its nature, fixed realty ; though declared to be personalty, must, nevertheless, be governed by the law of the state in which the canal is.—The termination of a canal at the tide in a certain district, must mean at a convenient port in that district.—The usage as to the termination of canals. The difference between *river* and *canal* navigation.

No parol proof, nor any part of the proceedings of either branch of the legislature, can be admitted to explain the language of an act of Assembly ; except as to private acts, in which there may be a latent ambiguity.

ON the 22d of June, 1829, *Amos Binney*, of Boston, in Massachusetts, filed this bill against *The President and Directors of the Chesapeake and Ohio Canal Company* and *Isaac McCord*, praying for an injunction to prohibit the doing of certain acts, which, he alleged, would be greatly and irreparably injurious to his rights and property—and, on the same day, an injunction was granted as prayed ; with leave to the defendants to move for its dissolution, at any time after filing their answers ; on giving to the plaintiff, or his solicitor, ten days notice thereof. Upon which an injunction was issued accordingly.

On the 15th of July, 1829, the plaintiff filed his petition, in which he stated, that the injunction after having been served, had been disobeyed by the defendants—whereupon he prayed an attachment, upon which, on the same day, writs of attachment were ordered, and issued returnable forthwith. On the 21st of the same month, the defendant *McCord* and *John Martineau* were brought before the court under the attachment ; when on recurring to the petition, and its exhibits, it appeared, that there was, in fact, no allegation of *Martineau's* having violated the injunction ; nor any prayer for an attachment against him—upon which it was moved, that he might be immediately discharged—and he was discharged accordingly ; and the attachment quashed, as to him, with costs—the court being then particularly engaged, it was agreed, that the matter of the attachment against *McCord* should lay over, with an understanding, that he should be permitted to go at large until called for ; but not to be considered as discharged from the process.

After which, some of the defendants filed their answers ; and gave notice of a motion to dissolve the injunction ; which motion was accordingly called up as being ready for hearing on the 8th of August, 1829 ; and the plaintiff's solicitor admitted notice—but

the defendant *McCord* claimed the privilege of having the attachment against him first disposed of; on the ground of the preference always allowed to cases, where a person is brought before the court in custody on a charge of contempt.

8th August, 1829, *BLAND, Chancellor*.—It is certain, that in all cases where an attachment from this court is in the nature of mesne process; or where, as in this instance, it has been issued, upon an *ex parte* affidavit, for a contempt, of which the party may clear himself by answering interrogatories, or shewing cause, the sheriff may take bail for the party's appearance; and although the sheriff is not bound to take bail, yet if he does do so, he may sue and recover upon the bail bond, in case the party should fail to appear. (a) Upon a return of *cepi corpus*, the course in England, now is, to send a messenger to bring him before the court; (b) but here, as formerly in England, and as in cases at common law, the sheriff may be ordered to bring in the body. (c) In this instance,

(a) Anonymous Gilb. Eq. Rep. 84; *Danby v. Lawson*, Prec. Chan. 110; Anonymous Prec. Chan. 331; Anon. 2 Atk. 507; *Studd v. Acton*, 1 H. Blac. 468; *Morris v. Hayward*, 1 Com. Law Rep. 485; *Hurd v. Partington*, 1 Exch. Rep. 358; Com. Dig. tit. Bail, F. 8.—(b) Anonymous Pra. Chan. 331; Anon. 2 Atk. 507.—(c) *Rex v. Daws*, 2 Salk. 608; *Forum Rom.* 70, 82, 1785, ch. 72. s. 23; *Cowell v. Seybrey*, 1 Bland, 18, note; *Bryson v. Petty*, 1 Bland, 182.

LEE v. SWEETMAN, 1713.—*Ordered*, that an attachment of contempt issue against the sheriff for not returning his writs of attachment against the defendant.—*Chancery Proceedings, lib. P. L. fol. 11.*

BLADEN v. FORBS, 1713.—*Ordered*, that attachment of contempt issue against the sheriff for not having the defendant's body in court according to the return of the writ.—*Chancery Proceedings, lib. P. L. fol. 12.*

WALLACE v. BOTELER. This was a bill filed on the 5th of August, 1797, to foreclose a mortgage of real and personal estate.

May, 1789.—*HANSON, Chancellor*.—*Ordered*, that the sheriff of Prince George's county bring into court the body of the defendant on the twenty-third day of May instant, he being by the said sheriff returned 'attached,' to answer in this case.

The defendant having failed to answer, and not having been brought into court, the case was again brought before the court.

18th July, 1798, *HANSON, Chancellor*.—The sheriff of Prince George's county having failed to bring into court the body of the defendant, agreeably to the tenor of the order for that purpose passed, during the present term, and regularly served upon him. It is thereupon *adjudged* and *ordered*, that Notly Maddox, the sheriff aforesaid, be and he is hereby, on motion of the complainant, amerced the sum of twenty pounds current money; unless he shall bring into court the body of the said defendant on the first day of next October term; provided that a copy of this order be served on the said sheriff any time before the first day of September next.

After which, the defendant answered, and a decree was passed by consent for a sale of the personal estate only, &c.

no bail having been taken, the party is before the court in custody, and, therefore, to obtain a discharge from confinement, has a right to have his case heard before any other matter now ready to be presented to the court.

But considering this attachment as being, in reality, nothing more than an auxiliary to the injunction, the judgment upon it may be much better adapted to its chief purpose after, than before the court has determined, whether the injunction shall be continued or not; since it is obvious, that if the injunction should be dissolved, nothing will be left, under the attachment, but the bare contempt; whereas, if the injunction should be continued the court may order the party to remove any injurious work he may have erected, after the service of the injunction, as a part of the punishment, under the attachment.

Upon which the solicitors of the plaintiff, at once, waved all claim to have the attachment enforced, in any other respect, than as an aid of the injunction; and consented, that the two subjects should be considered together; and that the attachment should abide the fate of the injunction. With this understanding the case proceeded upon the motion to dissolve the injunction; and the bill and answers were read and explained.

WATT'S creditors v. CAMPBELL, trustee.—8th July, 1808, KILTY, Chancellor.—On motion of the counsel of Winand, in whose behalf the order of which the within is a copy was made; and it appearing by the affidavit, that the said order was served, which was not obeyed. It is *ordered*, that the sheriff of Charles county be amerced in the sum of £75; and the further sum of £10, for a fine for the contempt and costs; unless he shall bring into this court the body of J. Campbell, trustee for the sale of the real estate of E. Watts, deceased, being the same person mentioned in the order, of which the within is a copy, on some day during the sitting of the court, at September term next.

After which, on motion of the counsel for J. Winand, this matter was again brought before the court.

27th October, 1808.—KILTY, Chancellor.—*Ordered*, that the amercement in the order of July 8th, 1808, be no longer continued; but be and the same is hereby adjudged to be final; the said sheriff T. A. Davis not having brought into court the body of J. Campbell therein mentioned, according to the tenor of the said order—and it is further *ordered*, that the said sheriff T. A. Davis pay to the said J. Winand, on or before the 15th of November next the said amercement, being £75 and costs; and do also pay the fine for contempt, being £10.

An affidavit of the service of this order was made on the 25th November, 1808; and Winand by his petition filed on the 2d December, 1808, prayed for a *ca sa*.

2d December, 1808.—KILTY, Chancellor.—Let a *ca. sa.* issue as prayed to the coroner of Charles county, returnable to the first day of the ensuing term.

8th August, 1829.—BLAND, *Chancellor*.—It appears, and is now admitted, that the body politic, called '*The Chesapeake and Ohio Canal Company*,' has not been made a party to this suit; and therefore, it will be proper, at once, to declare, that on that ground alone, this injunction must be dissolved, and the attachment quashed. But as the solicitors of the parties have come prepared to discuss this motion upon its merits, it may be better for all concerned, that the argument should proceed as if there were no errors in the pleadings; or as if the facts, now disclosed, were presented in such a form as the parties were willing to abide by; only so far noticing the present defects in the pleadings as to enable the court to say to what extent they require amendment. Because if the plaintiff stops here with a mere order that the injunction be dissolved; and immediately asks for an amendment of his bill, the Chancellor will expect a full and frank disclosure of all the facts of the case, as now developed by these erroneous proceedings, and will use his discretion in granting or withholding a new injunction accordingly.

The solicitors of the parties entirely approved of these suggestions, and the argument of the case proceeded accordingly.

22d September, 1829.—BLAND, *Chancellor*.—The motion for the dissolution of the injunction heretofore granted, standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

A writ of injunction is one of the strong arms of the Court of Chancery, which is seldom put forth, in any case of magnitude, without being most sensibly felt. This great conservative power, in some form or other, seems to be an essential part of our code. If there were no means of instantly arresting any one, who should be seen moving with a most wicked speed to the perpetration of an irreparable depredation upon the property of another, our laws would be materially defective. And yet, on the other hand, if, upon any light pretext, the movements of a citizen might be suddenly checked, or any large and costly concern might be at once brought to a stand, and its operations restrained, for any length of time, positive ruin might be produced by the very means intended for preservation and protection. Therefore, on a bill for an injunction, or a *ne exeat*, though the court will act with a promptness almost amounting to surprise, care must be taken, that the application be made as promptly as possible. If the object

be to stop the erection, or further operation of a large and costly work, it should appear, that the application has been made as soon as the party became apprised of his rights, and the extent of the injury with which they were threatened; or, at least, it must not appear, from the bill itself, that there had been any express or tacit admission or acquiescence not properly accounted for. (*d*) A court of equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things, that occasions the application; (*e*) or, in other words, it grants or refuses an injunction, in many cases, not upon the ground of the right possessed by the parties; but upon the ground of their conduct, and dealing before they applied to the court for an injunction to preserve and protect that right. (*f*)

If the equity of the bill be of a very dubious character; or if it appears, from the magnitude, nature, and exigency of the case, that the defendant should have an early opportunity of relieving himself from the restriction, he is always, as in this instance, apprised of it, by an order, sent with the writ, allowing a motion to dissolve to be heard with or without answer; or on some short notice after filing the answer. (*g*) The only mode, now in use, of obtaining an injunction is by a bill; which should state a case of a plain right, which is in probable danger of being irreparably injured, or altogether defeated unless the injunction be granted as prayed; or in some other more suitable form. The truth of the facts set forth in the bill should be verified by the affidavit of the plaintiff; or, as in this instance, by his agent, if he be not a resident of the state; or the Chancellor must, in some other manner, be induced to trust the bill for the truth of its statements; (*h*) or an injunction may be granted, on the equity admitted by the answer after it comes in, although the bill has not been sworn to. (*i*)

An injunction bill, and indeed every other bill, whatever may be its nature, or object, assumes two propositions; first, that the subject of it is of an equitable character, such as falls within the

(*d*) *Jackson v. Petrie*, 10 Ves. 165; *Birmingham Canal Comp. v. Lloyd*, 18 Ves. 515; *Crowder v. Tinkler*, 19 Ves. 622; *The Mayor of Colchester v. Lowten*, 1 Ves. & B. 246; *Agar v. The Regents Canal Comp. Coop.* 78; *Mayor of King's Lynn v. Pemberton*, 1 Swan. 250.—(*e*) *Randell v. Murray*, 4 Cond. Chan. Rep. 148.—(*f*) *Wright v. Nutt*, 1 H. Blac. 154; *Blakemore v. The Glamorganshire Canal Navigation*, 6 Cond. Chan. Rep. 551.—(*g*) *Jones v. Magill*, 1 Bland, 182.—(*h*) *Anonymous*, 1 Vern. 120; *Schermehorn v. L'Espenasse*, 2 Dall. 364; *The State of Georgia v. Brailsford*, 2 Dall. 405.—(*i*) *Wilson v. Wilson*, 1 Desau. 224.

jurisdiction of a court of equity; and next, that the parties to whom the claim is alleged to belong, and against whom the relief is, if any, to be granted are all called by it before the court. If the bill be substantially deficient in either of these particulars, it may be shewn at any time; either as a ground for dissolving the injunction, or at the final hearing; when the bill may be dismissed at once, or be permitted to stand over with leave to amend, and make proper parties, if it may be inferred, from what then appears, that there are merits which may be brought before the court.(j)

This bill states that the plaintiff, *Amos Binney*, 'is seized in his own right, and as trustee for others, of certain land,' to which the irreparable injury complained of is about to be done; that is, *Binney and others* complain of an injury threatened, or about to be done to their property. But who are those *others*, or *cestui que trusts*? They are no where named, or in any manner made parties to this suit; nor does it appear, whether *Binney* holds with them as joint tenants, tenants in common, or, if they hold in severalty, how their respective parts are situated with respect to each other, and with respect to the river. Yet, from the nature of the right claimed, and the injury complained of, as we shall presently see, it is important, that all this should substantially appear, to enable the defendant to meet the case with such a defence as the law may entitle him to make, as well as, that the court should be enabled to give relief in a manner commensurate to the rights, and suited to the claims of the plaintiffs respectively, or collectively. The bill distinctly informs the court, that there are others who have an interest in the land as well as *Binney*; and yet it no where names them. They, therefore, cannot have their interests precluded, or bound by any decree, as parties to this suit. There are cases in which a trustee may sue alone; but it is very clear, that this is not one of them; and that, in this instance, it is indispensably necessary, that the *cestui que trusts* should be named and made parties. If they refuse to join *Binney* as plaintiffs, he may, to obtain the separate relief to which he is entitled, make them defendants. This objection might have been waived; and *Binney's* separate claim to relief, so far as it could have been shown, or, to a certain extent, might have been admitted. But upon this occasion, the defendants have specially relied on this as one of their objections.

By an act of assembly authority was given to create, or call into

(j) Penn v. L. Baltimore, 1 Ves. 446; 2 Mad. Chan. 301.

active existence a corporation by the name of *The Chesapeake and Ohio Canal Company*, with power to sue and be sued by that name.^(k) But, from the peculiar nature of such an artificial body, it can be made a party to a suit in no other manner, than by its designated legal appellation; because it can, in no other way, be noticed by a court of justice, or made known to the law. Its name is the very being of its constitution; the knot of its combination, without which it can perform none of its corporate functions.^(l) No body, whether natural or artificial, can be treated as a party defendant against whom no process is prayed. Merely naming a person in a bill as a defendant does not make him a party, unless process is prayed against him,^(m) nor can an injunction be granted against any one unless it be expressly asked for by the bill.⁽ⁿ⁾

This bill alleges, and repeatedly charges, that *The Chesapeake and Ohio Canal Company*, have withheld, and are about to injure the rights of the plaintiff. The nature of the wrong, and the means by which it is to be effected, are described; and all the injustice which has been, or may be so produced, is clearly and expressly imputed to *The Chesapeake and Ohio Canal Company*, as the chief actor, and moving cause of all. Every one else complained of is distinctly described as an officer or agent of that corporation. The bill, however, prays, that an injunction may be directed, not to that corporation, but ‘to the President and Directors of the Chesapeake and Ohio Canal Company and Isaac McCord aforesaid, their engineers, agents, and servants, and all others engaged by said President and Directors.’ And without asking for any process, calling on the corporation, named *The Chesapeake and Ohio Canal Company*, to answer, as a defendant; the bill, after naming the persons who were then President and Directors, only prays for a *subpœna* ‘to the said President and Directors and Isaac McCord, commanding them to appear and answer.’

Hence it appears, that the body politic itself has not been

(k) 1824, ch. 79.—(l) 1 Blac. Com. 475.—(m) *Fawkes v. Pratt*, 1 P. Will. 593; *Windsor v. Windsor*, 2 Dick. 707.—(n) *Savory v. Dyer*, Amb. 70; *Davile v. Peacock*, Barnar. 27; *Jesus College v. Bloom*, 3 Atk. 262.

BRANNOCK v. MOLL. 1720.—For the want of a prayer in the bill for an injunction; and sufficient bond not being given, the injunction is dissolved. Rule answer by next term. Afterwards the complainant by his attorney prays the bill in this cause may be withdrawn, and that the suit may surcease on the said bill, which is accordingly granted with costs to the defendant. On payment of costs, or good security given therefor, the new injunction brought is to be proceeded on.—*Chancery Proceedings*, lib. P. L. fol. 499.

made a party to this suit ; and that no injunction has been directed to it ; and consequently no restriction has been, or can be imposed upon its conduct ; nor can any order, or decree which has been or can be passed upon this bill, in any manner control, affect, or bind it, or its rights, interests, or property. The whole cause of complaint is against the corporation ; and therefore, it is evident, that the relief, to be at all effectual ; whether by an injunction, or in any other shape, must be imposed upon and directed against the corporation specially complained of, as the cause of the alleged wrong. It would be futile to bind up the hands, and give relief against the servant while the master was left free. And so, in this instance, it would be of no service to this plaintiff, and insure to him nothing of the substantial relief he seeks, by enjoining the present officers and agents of this body politic ; since, in doing so, the court would employ its powers against improper objects ; and therefore ineffectually. For, if the present officers and agents were restrained, others might be instantly employed, so as immediately to prosecute the alleged mischievous work. And the judicial authority would have gone forth, not to prevent wrong, but to induce a corporation to change its officers and agents, which would be idle.

Upon these grounds, and because of this palpable defect in the bill, the injunction, which issued in pursuance of its prayer, could not be sustained in any way whatever. Yet this corporation, called *The Chesapeake and Ohio Canal Company*, might have treated this defect in the bill as a mere misnomer of itself ; and by appearing and answering by its proper name, it might have waived all right to take advantage of the error.^(o) But it has not done so ; and its officers by their answer expressly rely and insist upon this objection to the bill.

The plaintiff might, it is true, have asked and obtained leave to amend his bill in this particular ; and the injunction would not, as of course, have been dissolved on making any trivial, or unimportant amendment. But where an amendment is asked for the purpose of introducing new facts, which give a different complexion to the case, or make any substantial alteration in it ; or where the object of the amendment is, as in this instance, to bring before the court the principal mover of the alleged wrong, so as to require a

(o) Gilb. Com. Plea. 234 ; *Road Company v. Creeger*, 5 H. & J. 124 ; *Bosley v. The Susquehanna Canal*, 21 April, 1829, post.

new frame and direction to be given to the writ of injunction itself; there the very prayer for such an amendment carries with it a tacit admission, that the basis of the injunction, which had been previously granted, is substantially wrong; and therefore, upon granting the amendment the injunction is gone of course, unless expressly saved by the terms of the order granting the amendment. (p)

This bill has, however, not only omitted to bring before the court, those who, it appears from its statements, have an interest in the claims and pretensions set forth; and also that body who is charged to be the cause of all the alleged injury; but it has brought before the court certain persons, who in the capacities in which they stand here, have not the least interest in the matter in controversy; for, where the legal capacities of parties are different, such capacities must be considered as if they were several persons. (q)

It is stated, that '*Charles F. Mercer*, is the president of the said company, and *Joseph Kent*, *Andrew Stewart*, *Peter Lenox*, *Fredrick May*, *Walter Smith*, and *Phineas Janney* are the directors of the said company;' and a writ of *subpœna* is prayed against the said president and directors; so that, by this description of person, those individuals have been called here, in their natural capacities, to answer this bill. But, in those capacities, they have no interest in the matter, as is manifest, from the very sum and substance of the charges; and therefore, they ought not, as such, to have been made parties; and if they had, on that account, demurred to the bill, their demurrer must have been sustained. (r) It appears that *Isaac McCord* has no other concern with this matter than as a contractor with, or agent of *The Chesapeake and Ohio Canal Company*; and yet a *subpœna* has been expressly asked for against him by name; and he has been brought here as a defendant. Agents and servants of the principal may be served with the injunction and made to obey it; but they should not be made parties to the suit. Persons who stand thus uninterested in the matter in controversy cannot be made parties to the suit. Where a person who has no interest in the matter has been improperly associated with others as a defendant, the bill may be dismissed as to him, with costs;

(p) *Bliss v. Boscawin*, 2 Ves. & B. 102; *Eden Inj.* 87; *Pratt v. Archer*, 1 Cond. Chan. Rep. 221; *Davis v. Davis*, 2 Cond. Chan. Rep. 526; *Powell v. Lassalette*, 4 Cond. Chan. Rep. 260.—(q) *Coppin v. Coppin*, Select Ca. Chan. 30; S. C. 2 P. Will. 295; *Salmon v. The Hamborough Company*, 1 Ca. Chan. 204; *Meliorucchi v. Royal Exch. Assu. Comp.* 1 Eq. Ca. Abr. 8, p. 8; *Johnson v. Mills*, 1 Ves. 283; *Ward v. Northumberland Anstr.* 477; *Rann v. Hughes* 7 T. R. 350, n.; *Lyle v. Rodgers*, 5 Wheat. 407.—(r) *Salmon v. The Hamborough Company*, 1 Ca. Chan. 204.

without prejudice to the case as regards all others. But it happens, unfortunately, in this case, that if the bill were to be dismissed as against these defendants, who have no interest in the case, there would be no defendant in court, and the whole suit would be totally broken up.

Where there are a plurality of defendants, they may join in making answer to the bill, or they may answer separately, or they may make a joint and several answer as best suits their convenience or pleasure. But, in whatever form the response may be couched, it is essential, if not waived by the plaintiff, that each defendant should swear to his answer; and therefore, when an answer purports to be the answer of two or more, and is not sworn to by all, it may be taken off the file, or can only be received as the answer of him who has sworn to it. (s)

In this instance, it appears, that on the 21st of July last, an answer was filed, which purports, and is set forth in the beginning to be 'The separate answer of the *President and Directors of the Chesapeake and Ohio Canal Company*,' who, by this description, on reference to the bill, are determined to be '*Charles F. Mercer*, the president of the said company, and *Joseph Kent*, *Andrew Stewart*, *Peter Lenox*, *Frederick May*, *Walter Smith*, and *Phineas Janney*, the directors of the said company.' But, of all those seven persons whose answer it purports to be, it has been sworn to by *Charles F. Mercer* only. It can, therefore, be received, at most, as being no more than his answer alone; and so taken, it appears, that the other six persons have not, as yet, answered at all. Hence, according to the general rule, this motion for a dissolution could not be sustained upon the answers of only two of these defendants; unless it should appear, that the defendants who had not answered, had neither any interest in, or material knowledge of the matter; or that their answers might be dispensed with for some special reason. (t) But, in this instance the interest, and the knowledge of those directors, it is evident, must be, to the full, as extensive as those of *Mercer* and *McCord*; and, consequently, there is no reason why this plaintiff should not have the benefit of all their answers, before he is called upon to shew cause why he

(s) *Harris v. James*, 3 Bro. C. C. 399; *Done v. Read*, 2 Ves. & B. 310; *Cooke v. Westall*, 1 Mad. Rep. 265; *Cope v. Parry*, 1 Mad. Rep. 83; *Griffiths v. Wood*, 11 Ves. 62; *Pieters v. Thompson*, Coop. Rep. 249.—(t) *Jones v. Magill*, 1 Bland, 177; *Onion v. McComas*, ante 83, note.

should not be made to part with his injunction ; if his bill were in all respects such as to give him a just claim to its continuance.

On the 21st of July last, *Isaac McCord* filed his answer, in which, after stating that he had contracted with this company to execute certain work ; and otherwise very imperfectly answering the bill ; apparently with a view to make up for the insufficiency of his answer, he says, 'he made a contract with them as stated in his answer to the petition of the complainant ; to which he refers, and which answer he prays may be taken as a part of this his answer to the bill of complaint. A reference to the same will render it unnecessary for this defendant to give a particular answer to the charge in the bill.'

It is presumed, that this defendant meant by this to refer to and invoke as a part of his answer to the bill, the answer which he had, or rather intended to have given to the petition, praying for an attachment against him. But, on referring to the answer which he actually made to that petition, it appears, that it was not sworn to until the 28th day of the same month ; nor filed until the 3d day of August following. It is therefore evident, that, although this mode of making an answer sufficient, by referring to, and adopting an answer of a co-defendant, or by splicing on to it another answer belonging to a different subject, may be tolerated to a certain extent ; (u) yet here, the dates of the affidavits and filing of the papers demonstrate, that it has not, in fact, been done. And, consequently, this answer of *McCord*, taken without the aid of the matter invoked, affords to him and his co-defendants not the slightest ground for dissolving this injunction.

Having thus reviewed the pleadings, I shall now gather up the facts, as stated in them, and their respective exhibits ; and inquire, whether they present any equity which merits a more decent garb, or which ought to be allowed to come again before the court in an orderly manner. And overlooking the errors of the pleadings, I shall, in speaking of the parties, consider *Amos Binney* as the plaintiff, and *The Chesapeake and Ohio Canal Company* as the defendant.

In the bill, and its exhibits, it is alleged, that *Amos Binney* is seized in his own right, and as trustee for others, of certain lands situated adjoining to the little falls of the Potomac river, partly in Maryland, and partly in the District of Columbia, beginning at the

(u) Anonymous, 1 P. Will 300 ; *Whitworth v. Davis*, 1 Ves. and B, 549 ; *Jones v. Magill*, 1 Bland, 198 ; *Lingan v. Henderson*, 1 Bland, 267.

head of the little falls, and extending down along the river ; which property is naturally possessed of great and peculiar advantages, in the application of water to mills ; for which purpose the plaintiff, and all others, owning lands so situated, have a right to use the waters of the river ; that the plaintiff is entitled to certain rights and privileges, under the act of 1784, ch. 33, s. 13, which *The Chesapeake and Ohio Canal Company* deny, oppose, and prevent him from being let into the enjoyment of ; although they have succeeded to the rights, and have subjected themselves to the claims and franchises which were demandable from the body politic incorporated by that law ; although the canal, made under the authority of the act of 1784, has had admitted into it a sufficiency of water both for navigation and water works, as is evident, from the quantity of waste water now thrown off, in various sluices upon the land of the plaintiff ; and although this plaintiff is able and willing, and has offered to agree to contribute to enlarge the canal for the purpose of letting into it an additional supply of water, if it should become necessary.

It is further stated, that the plaintiff is a stockholder in *The Chesapeake and Ohio Canal Company*, the President and Directors of which body politic have commenced and are now engaged in the work of extending the canal, for the making of which their act of incorporation was passed, from a point on tide water, called the old locks, two miles above Georgetown, and easy of access to any sea vessel which can reach Georgetown, to the city of Washington without any legal authority whatever ; and to avail themselves of a power they claim of disposing of waste water from the canal, have purchased lands on its illegally extended line below the lands of the plaintiff with an intention to erect water works ; or solely with a view to subserve local interests, and to speculate in lands, mill-sites, and water privileges ; which illegal extension of the canal, and purchase of land are designed to work a fraud upon the interests of the plaintiff ; first, by materially and irreparably injuring, or destroying the natural advantages peculiarly incident, and belonging exclusively to his land, and constituting its chief value ; secondly, by materially and irreparably injuring or destroying the rights secured to him by the act of 1784, ch. 33, s. 13 ; thirdly, by irretrievably depreciating the value of his mill-sites by the formation of others, adjoining to them, along the line of the illegally extended canal ; and lastly, by expending the funds of the body politic, including a portion of that which belongs to this plaintiff, as a stockholder, in a way not authorised by their act of incorporation.

It is further stated, that the plaintiff is debarred from the use of his property, and threatened with still greater injury by *The Chesapeake and Ohio Canal Company*, who are erecting an immense dam, abutted on his land, in Montgomery county, and extending entirely across the river, and of sufficient dimensions to obstruct the whole of its waters from their accustomed channel, and to divert them entirely away from his lands ; and thus totally destroy the advantages, for mill-sites, which they naturally possess ; and also to deprive him of his rights under the act of 1784, ch. 33, s. 13. All which has been done, or is about to be done by the defendants, without the consent of the plaintiff ; without his having been compensated for his property ; and without its having been valued and condemned in any manner according to law.

In the answers and their exhibits, it is alleged, that the body politic, created by the act of 1784, ch. 33, had, by virtue of their powers, acquired a right to land in Montgomery county, at the place in question ; and had erected thereon a dam across the river, which is to give place to the one now complained of ; that the proposed dam is neither to be abutted, nor erected on any part of the plaintiff's land ; that the old canal, from the old dam downwards, was twenty-five feet wide, and two feet deep ; and, these defendants, having resolved to use it, without any enlargement, as a feeder to the new canal, deemed it necessary, in order to furnish a sufficient supply of water to the new canal, to raise the new dam four feet higher than the old one ; so as to pass into that portion of the old canal, designed as a feeder, a depth of six feet of water. And it is further alleged, that the proposed elongation of the new canal, and the mode of supplying it with water, have been determined upon with a view to the uses for which the canal was specially designed ; and to those reservations, in the acts incorporating these defendants, in favour of Maryland, Virginia, and Congress ; and, likewise, with a view to such other uses as were not then, but which might thereafter be allowed to be made of the water thus introduced into that end of the new canal ; and these defendants did, accordingly, petition the several legislatures for the privileges, denied to them in their charter, of applying the surplus water in the canal to manufactories ; and they now claim the right to sell and dispose of the waste water ; wherever wastes shall be essential to the security of their canal ; and it is positively denied, that the whole of the waters of the river, or even one tenth part of them, at their most reduced summer volume, can be diverted by the dam,

which the defendants are now erecting, and passed through the feeder into their new canal.

And it is further alleged, that the old locks, from which the extension of the canal complained of is to be made, are below the dam; and within the District of Columbia; and consequently, that the whole of the extension of the canal, charged to be illegal, is beyond the jurisdiction of this court; that the proper termination of the canal is a matter which, by the act of incorporation, belongs exclusively to these defendants alone; and has been accordingly determined upon by the company at a full meeting of the stockholders, convened for that and other purposes; and moreover, that, after it had thus been determined upon, the matter was brought before the Circuit Court for the District of Columbia, and the judgment of that court pronounced thereon; which judgments of the body politic and of the Circuit Court are final and conclusive upon the matter, as against this and all other tribunals.

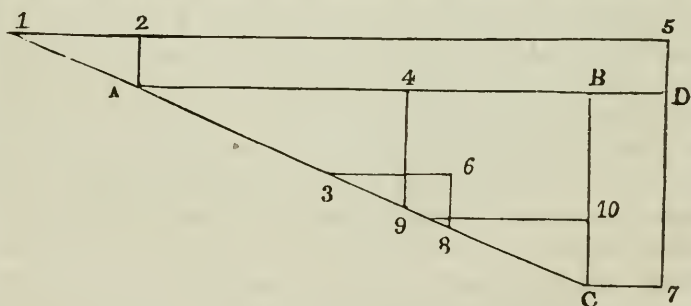
Bills of injunction are always submitted to the chancellor *ex parte*, and most commonly asking relief under some pressing emergency, which admits of little or no delay. It is not always practicable, thus, to obtain a clear view of the case from the bill alone; the haste, negligence, or unskillfulness with which it has been framed often leaves a mist hanging over a part of the case where light is most wanted; nor is it easy, in every instance, at once, to look through the mazes of a complicated case, so as either to appreciate the merits of the plaintiff's pretensions at their full worth, or to detect their infirmities, and want of equitable support. Under such circumstances, if there appears to be strong and plausible reason to believe, that the plaintiff has a just claim to relief, I have always deemed it best to grant the injunction, because for the purpose of obtaining an injunction, it is sufficient that the case be important and doubtful; (w) and at the same time to give the defendants, as in this instance, an opportunity of having its propriety reconsidered as soon as possible. (x)

Passing by the informalities of the pleadings, there appear to be three distinct subjects presented to the court for investigation. *First*, the plaintiff's claim to certain natural mill-sites which, it is alleged, are in danger of being irreparably injured or destroyed. *Secondly*, the plaintiff's claim to certain artificial mill-sites, derived from the defendants' canal, which also, as it is alleged, are in like imminent danger—and, *Thirdly*, the illegal and unauthorised expen-

(w) *Mestaer v. Gillespie*, 11 Ves. 636.—(x) *Drew v. Harman*, 2 Exch. Rep. 256.

diture of the funds of the body politic, by its President and Directors, to the great prejudice and irreparable injury of the plaintiff, who is one of the stockholders thereof. A careful examination of these three subjects will carry us over all the causes of complaint now brought before the court.

The plaintiff alleges, that he is the owner of certain natural mill-sites, which are in danger of being ruined by the defendants; and, therefore, he asks to have them protected. Natural mill-sites differ according to the form of using water as a propelling power. But here the kind of natural mill-sites claimed are sufficiently designated by describing them, as being situated on the margin of the river Potomac, above tide water; and where the river is a rapidly descending stream. It follows, therefore, that the kind of mill-sites spoken of are those where machinery is propelled by falling water. So much of this case depends upon having a just conception of a mill-site of this kind, that I deem it proper to be particular in the description of it; and, since truth is often more readily and effectually conveyed to the mind by the *eye*, than by the *ear*; I have thought it best, for the purpose of giving a more distinct explanation of this matter, to subjoin the following figure or diagram. (y)



Let the line A C represent the margin of the declined plane of the bed of the stream over which the water continually pours from A toward the tide at 7; and let B represent a position on the land, elevated twenty feet above the water at C. Now, to constitute such a natural mill-site as is claimed by the plaintiff in this case, it is necessary, that it should be practicable to conduct the water from the stream at A, to the position B, and there cause it to propel mill machinery by its fall from B to the level of C. The line A B, in mill-sites of this kind, will represent the head race; and

the line B C the tail race; and consequently, a natural mill-site, on the margin of any gradually descending river or stream, must always convey to the mind the idea of a portion of land described by straight, or curved lines, as from A B C, with a pitch or fall from B to C, equal to that of A C. The length of the head or tail race is, comparatively unimportant; it is enough, that they be practicable; nor is it of any consequence what is the height of the pitch, or the quantity of water tumbled from B to C; it is sufficient, if it be so high, and so much as to propel the machinery of a mill. It follows, from this view of the subject, that every such situation, on the margin of a running stream of water, is a mill-site, of the kind of those claimed by this plaintiff. And, if water enough can be brought from A to B, and there is room at B for building two or more mills; then there may be said to be on that portion of land just so many natural mill-sites.

One natural mill-site may exist outside of another. Let the plane of the descending stream, as before described, be followed up to 1; and then extending the head race thence to the mill position at 5; and the tail race to the stream at 7; and there will be represented what may be called, in reference to the stream, and to each other, an inner and an outer mill-site. Again, one natural mill-site may exist above another; thus, suppose the head race of the upper mill to begin at A, that it is stationed at 4, and discharges its water, by a tail race, at 9; and that the lower mill occupies the ground 8 10 C.

Now these several mill-sites, when owned as the separate property of individuals, carry with them certain incidental rights; each one has a right to the use only of the descending water; and consequently, he can neither divert, nor consume it; nor use it to the prejudice of another. And therefore a dam cannot be raised, A 2, so as to catch and divert the whole stream from 1, and carry it to the outer mill at 5, and pass it off at 7, leaving none, or not enough to be taken at A to propel the mill at B. Nor can the lower mill owner be allowed to raise the water in the stream, by a dam 8 6, so as to cast it back to 3, and flood the wheels of the upper mill at 4.

But, a natural mill-site may exist, as any other thing may exist in nature, without being the separate property of an individual. Hence, in making out a claim to a natural, unimproved mill-site, the party must shew, not only, that it exists, but that he is the owner of it. The whole of the land described by the lines A B C

is necessary to constitute a natural mill-site ; and therefore, unless an individual owns the whole of that land, he cannot be considered as the owner of the mill-site. Thus, suppose, that portion of this land included within the lines A 4 9, belonged to X ; and, that another portion, included within the lines 8 10 C, belonged to Y ; and the residue to Z ; it would be perfectly evident, that neither of the three persons could be said to be the owner of the mill-site ; because neither could encroach or trespass upon the other ; and a portion of the land necessary for the head and tail race being cut off, from the only suitable position for the mill, neither of them could be considered as the owner of a mill-site.

This distinction between the natural existence of a mill-site, and its being the separate property of an individual has been long expressly recognized, even in our statute book ; as is shewn by the act of assembly which declares, that any person who may be desirous of building a *forging mill* upon land, next adjoining to any run of water, of which he is not the owner, may obtain from chancery a writ of *ad quod damnum* ; and have it, to the extent of one hundred acres, condemned to him for that purpose. (z)

The plaintiff alleges, 'that he is seized in his own right, and as trustee for others, of certain lands, situate adjoining to the little falls of the Potomac river, partly in Maryland, and partly in the District of Columbia, beginning on the river at the head of the little falls, and extending downwards ; which property is naturally possessed of great and peculiar advantages in the application of water to mills.'

This is the whole, and the best description of the mill-site claimed by the plaintiff, that I have been able to collect from the proceedings. It may be admitted, that he is seized in his own right, and as trustee for others ; but how, and where the lands are situated which he claims as his own, or which he holds as trustee for others does not appear. A mill-site is a separate and entire thing, incapable of division ; the land, of which it is naturally constituted, may be held in joint tenancy, or in common ; but the moment it is divided and taken in severalty, the ownership of the mill-site is gone, although its natural existence remains. It may be true, as alleged, that the several parcels of land of which *Amos Binney* and others are the separate owners, when taken together, may have great advantages in the application of water power to mills ; and

yet, that no one of the several owners of the lands, when taken in the separate parcels in which it is held, be entitled to any one mill-site. And this, there seems to be good reason to believe, is the real truth of the case.

From the plot, filed as the defendant's exhibit B, it appears, that the lands, lying between the head of the little falls and the tide, were granted by the state, in many distinct parcels; and most probably to different grantees. The several tracts, called *Arell's Folly*; *Addition to Arell's Folly*; *Jacob*; *Resurvey on Jacob*; and *White Haven*; besides other parcels, not named, are represented as lying along the river between the head of the little falls and the tide. From the plaintiff's printed exhibit A, it would appear, that the mill-site, lying on the margin of the river, from the head of tide upward, belonged, in the year 1770, to one *John Balendine*; that he sold it to *Way, Paxson and Cloud*; all, or one of whom held it about the year 1784; that, prior to the year 1816, it had passed into many other hands; that it then became vested in two persons; then in a family; and then the plaintiff purchased one-fourth. And, in some loose marginal notes on another plot, marked as the defendant's exhibit B, some of the land along the river, from the head of the little falls to tide, is said to be, at present owned, or claimed in separate parcels by the claimants of *Arell's Folly*, and the claimants of *Jacob*, in distinct pieces; by *William Stewart*, by *William Murdock*, and by *Adam Cloud's* heirs. The defendants do not admit that the plaintiff is entitled to a mill-site on any part of this land; and, therefore, as in such case, the plaintiff must set forth and sustain his title by proof, it would be impossible to pronounce, from the pleadings, if they were ever so clear in representing only these facts, that the plaintiff was entitled to any mill-site, lying on any part of the river shore within the jurisdiction of this court.

But, let it be supposed, that the plaintiff had set forth, and sustained his title to a mill-site. The next inquiry is, as to the kind of danger with which he alleges it to be threatened. It must be recollected, that the mill-site thus claimed, must lay below the head of the little falls; because he claims no land above those falls. The injury, against which he asks protection, he says, will be produced by the dam, which the defendants are erecting across the river Potomac, four feet above the present surface. But this dam is on the very upper point, as he alleges; or, as the defendants allege, entirely above his land; and, consequently, he cannot, in any way,

be injured as the holder of an upper mill-site, by casting back the water, and flooding his works, or diminishing his fall of water. This, I conceive to be perfectly manifest from the description given of an upper and a lower mill-site. But, to recur to the diagram for illustration, the plaintiff alleges, in effect, that the dam complained of is as at A, and being raised to 2, will divert the whole of the water of the river from 1 to 5, and let it into the tide at 7; by which his mill-site A. B. C. will be totally destroyed.

Taking this view of the subject, the plaintiff, according to his own shewing, must be considered as the owner of the inner mill-site; and the defendants of the outer one. And, supposing them to be alike entitled to the use of the water, it is undeniably true, that the defendants can have no right, so to divert it as to diminish the value of the plaintiff's mill-site; much less to destroy it. On adverting to the prodigious extent of the country drained by the Potomac, above the point where this dam is to be placed, it must strike every one, as very extraordinary, if true, that a dam, four feet high across the river, at that point, should be sufficient to divert the whole of its waters through a canal of only six feet in depth, and twenty-five feet in width. But the fact is positively denied. It is said, that not more than one-fifteenth part of the waters of the river, at its most reduced summer volume, can be so diverted by this dam. And, therefore, the fact, on which this part of the plaintiff's complaint is grounded, being untrue, the complaint itself is deprived of its only just foundation. For if the plaintiff's mill-site, be, as he alleges, constituted of the situation A. B. C. and he finds water, at the commencement of his head race in sufficient abundance for all the purposes of his mill-site, he can have no possible cause of complaint; however high, or in whatever way the projected dam across the river may be formed. (a)

But the plaintiff alleges, that his mill-site is likely to be depreciated in value, almost to nothing, or totally destroyed by the unlimited rivalships of new mill-sites; which the defendants will create by their projected dam across the river. Again recurring to the diagram for illustration, this complaint is to this effect: The dam A. 2. will enable the defendants to conduct the water of the river from 1 to 5; and, consequently, all that space of land between that head race and the river, below the plaintiff's mill-site A. B. C.

(a) *Bealey v. Shaw*, 6 East, 208; *Palmer v. Mulligan*, 3 Caine's Rep. 307; *Beissell v. Sholl*, 4 Dall. 211.

may be formed into mill-sites, outside of his and in ruinous rivalry of it. This cause of complaint, it is believed, however, assumes a principle of law for its basis, which has hitherto never been gravely proposed to be acted upon by any one; much less sanctioned by any of our courts of justice. It is said, in some of the English books, that a new market, or ferry shall not be set up so near an ancient one, as to draw away its custom. But it is no nuisance or wrong for one man to erect a mill so near to that of another as to draw away its custom; or to enter into competition with it in any manner whatever. (b)

Supposing then it were true in point of law, as it is not, that the defendants could lawfully appropriate their canal, from 1 downwards, to the purpose of a head race to a closely set row of mills for several miles long, below, and outside of the mill-site of the plaintiff; still, as their doing so would be lawful, the plaintiff would have no legal cause of complaint, on the ground of the depreciating effect thereof upon his mill-site. If the state grants a patent and induces people to lay out a great fund, it would, as has been said, be wrong to grant a rival patent wantonly. (c) But it would be bad policy, unjust and unconstitutional, as having the effect of a monopoly, to prevent any one from making any use whatever of his own property, because of its operating as an injurious rivalry of another who was not thereby in any way hindered from making a similar or any other use of his property.

But, supposing all that has been said, in relation to the plaintiff's legal rights to certain natural mill-sites, to be entirely erroneous; and, that those claims are in all respects valid; then it follows, from what he himself has stated, that the land, or a portion of it, which is necessary to constitute those mill sites, lies in the route of the proposed canal, and is about to be occupied by it. If so, it is certain, that it may be condemned for that purpose in the manner prescribed by the act of Assembly. (d) And in the valuation, so directed to be made, all its worth, whether inherent, or incidental; its value arising from its fertility and mineralogical contents, as well as its value arising from its affording mill-sites or its peculiar suitableness for any other purpose, should, and no doubt would be duly considered and estimated under the inquisition and condem-

(b) 3 Blac. Com. 219; *Hale de Port. Maris*, 59, 60; *Blessett v. Hart*, Willes Rep. 508.—(c) *Ex parte O'Reilly*, 1 Ves. jun. 114. *The Vauxhall Bridge Company v. Spencer*, 2 Mad. Rep. 355. S. C. 4 Cond. Chan. Rep. 28.—(d.) 1824, ch. 79, s. 15.

nation. Therefore, even if the plaintiff has his natural mill-site taken from him by these defendants for their canal, he has a legal and proper remedy, and cannot be relieved in this way. Besides, it is declared by that act of Assembly, 'that the *pendency* of any proceedings in any suit, in the nature of a writ of *ad quod damnum*, or any other proceedings, shall not hinder, or delay the progress of the work.' (e) And, consequently, this court would not interpose, in any way, further than to compel these defendants to institute and prosecute with reasonable diligence proceedings, in the nature of a writ of *ad quod damnum*, under this law, so as to enable the plaintiff to obtain the redress specially provided for him; unless there were some fraudulent circumstances; or some deviation from the line prescribed, or going beyond the authority given. (f)

From all these considerations and views of the subject, it is certain, that it has not been distinctly shewn, that the plaintiff is the owner of any natural mill-site; between the point where the defendants are erecting their dam, and the tide water of the river—and even if he is the owner of any such mill-site, the acts imputed to the defendants, being either denied as untrue to the extent set forth; or being in themselves legal, are not of such a nature as to form the foundation of any complaint against them by this plaintiff, as the owner of such natural mill-site.

The next stand taken by this plaintiff is upon the privileges, which, he alleges, have been secured to him by the act of assembly incorporating *The Potomac Company*, upon whose estate these alleged privileges were charged; (g) which company were, for certain considerations, authorised to convey to *The Chesapeake and Ohio Canal Company*, all the property, rights and privileges by them owned, possessed, and enjoyed; and the new company were enabled to accept such transfer, and to hold, possess, use and occupy all the property, rights and privileges in the same manner, and to the same effect as *The Potomac Company* had held, and occupied the same by law. (h) And, upon this conveyance being made, *The Potomac Company* was to be vacated, annulled, and dissolved. This last solemn testamentary act of *The Potomac Company*, it is admitted, has been properly made, and that body politic has expired

(e) 1824, ch. 79, s. 19.—(f) *Vernon v. Blackerby*, 2 Atk. 145; *Ex parte Vennor*, 3 Atk. 770; *Rex v. Inhabitants of Flecknow*, 1 Burr. 465; *Hughes v. Trustees of Modern College*, 1 Ves. 188; *Agar v. The Regents Canal Company*, Coop. Rep. 78.
 (g) 1784, ch. 33, s. 13.—(h) 1824, ch. 79, s. 13.

and is now no more. (i) It is also admitted, that *The Chesapeake and Ohio Canal Company*, as the devisee or purchaser of all the estate of *The Potomac Company*, can only take and hold subject to all the incumbrances of which the title deeds of that company, that is, the acts of Assembly by which they were incorporated gave them notice, by their being specified therein. (j) And, consequently, if this plaintiff can establish his claim against the estate of the defunct, it must be allowed and sustained as equally available against these defendants, who have taken subject thereto.

Supposing that act of incorporation, (k) without having guaranteed any thing like a monopoly in favor of the plaintiff as against any one, to have secured to him the water rights to the full extent of his pretensions; then they amount to no more than to a right to so many mill-sites as can be laid out upon his land, so far as it lies along the river, and is conterminous with the canal, constructed under the authority of that act, and nothing more—conceding, for the present, the correctness of this claim, the next inquiry is, whether the acts imputed to the defendants can do any such injury as is complained of.

The plaintiff claims to have the canal considered as the head race to his mill-sites. The projected dam, which the defendants are constructing, it is perfectly manifest, even if it should divert every drop of water from the original bed of the river into it, cannot, in that way, do his property any harm; because all the water which he claimed the right to use, would be thus poured into the head race of his mill-site. Nor can the raising of this dam four feet higher be of any injury to it; on the contrary, it must be beneficial; because, instead of giving him the command, as he now has, of a head of only two feet of water, he will have six feet in his head race—and so far as the defendants may have a right to conduct the water, by means of their canal, to mill-sites outside of, and below that owned by the plaintiff, it will be seen, that every principle of law, shewn to be applicable to a natural mill-site, bears with equal force upon those of the description claimed by the plaintiff—and, therefore, unless he can shew, that the defendants, as owners of outer mill-sites, have so diverted the water as to leave not the usual quantity for his use, he has no cause of complaint. But, that is not alleged or pretended. Therefore, upon these

(i) *Curson v. African Company*, 1 Vern. 121; 1785, ch. 39; 1801, ch. 104.—
(j) 1784, ch. 33, &c.—(k) 1784, ch. 33.

grounds, this subject of the plaintiff's complaint might be, at once, dismissed as utterly without foundation.

But, the plaintiff contends, that these rights have not only been reserved to him by this law, but have been secured to him, as against *The Potomac Company*, and those claiming under them, as a monopoly; which, it is alleged, is about to be irreparably depreciated or destroyed, by means of the dam proposed to be erected by the defendants, by enabling them to create mill sites, which they may hereafter sell, and cause to be improved, with the leave, hereafter to be obtained, from the legislature; or, that by increasing the volume of water in the canal, they will be enabled to multiply the number of its wastes, and thereby add to the number of mill-sites created, in depreciation, and to the ruin of the plaintiff's monopoly.

It would seem to be a sufficient answer to this cause of complaint to say, that it is founded upon an assumption, that certain remote and contingent events are now approaching, and must happen, in consequence of the erection of this dam by the defendants; but which, it is obvious, may in fact never come to pass, or certainly not in the injurious manner complained of. The first of these events, thus referred to, is, that although the defendants have now no manner of right to create mill-sites, or to use the water of the canal for any other purposes than navigation; yet, that, if they are allowed to erect this dam, and prepare for such an use of its waters, some future legislature may be induced to suffer them to do so to the ruin of the plaintiff's rights. This may happen. But this court is bound, in due respect to the legislature, to presume, that they will, by no act of theirs, authorise, or sanction injustice, or deprive any one of his property, unless it be for the public good; nor even then without due compensation. (1)

As to the multiplication of *wastes* from the canal of these defendants, for the sinister purpose of selling them as mill-sites, it would appear to be enough to say, that the act incorporating the defendants, declares, that the water of only such wastes shall be sold as

(1) The power has been since granted to sell surplus water for mills, &c., so that such sales do not diminish the water in the bed of the river to the injury of the water rights of any individual and so that no part of any such surplus shall be applied any where within the state of Maryland, to the manufacture of any description of grain. Therefore the water power of the canal, within the District of Columbia, may now be disposed of for all manufacturing purposes, 1832, ch. 291; Acts of Congress 3 March, 1837, ch. 51.

mill-sites, as 'shall be essential to the security of the said canal, and in no other situation whatever.' (m) When this clear and positive restriction shall have been, or may be attempted to be violated by any thing, done with that view alone, which is not now alleged, or pretended, it will then be time enough to apply to a court of justice for redress, either by way of remuneration or prevention. (n) Therefore, at present, and in the form in which this cause of complaint is set forth, it forms no just ground for granting or continuing an injunction.

It appears, however, from the proceedings, that this claim of the plaintiff's under the act incorporating *The Potomac Company*, (o) is one which he has brooded over, and cherished for years past; and, although, as it would seem, he had never before, in any way, submitted it for the judgment of a court of justice; yet, that he had repeatedly urged it in other forms, and in the most solemn manner. If well founded, it is a claim, that may soon become a grievous perennial draft upon a large navigable high-way, common to this state and its *southern* neighbor; it is one which has been deduced from the upper portion of a great and valuable river, belonging altogether to this state, and forming its *southern* boundary; and it is one which has been interwoven with the longest and most important line of artificial navigation ever sanctioned or participated in by this republic. The plaintiff asserts his right, under this law, as to a privilege of a high and almost inestimable value, and the defendants oppose the claim, as a pretension utterly groundless; but which, if sustained, would become an incumbrance so vast, as to be destructive of the great work upon whose vitals it proposes to fasten and to feed. All these circumstances give to this claim an importance far more than ordinary; and exhibit it as one which, on every account, requires a most careful examination and deliberate consideration in all its connexions and bearings.

The *Potomac* river, it has been urged, must be regarded as a public navigable river far above tide; and as the common property and highway of the two states between which it is a boundary. In proof of its navigable character, it has been said, that so long ago as during the war of 1756, it was ascended, as high as *Cumberland*, by boats carrying a portion of the military stores of *Braddock's* army; and has frequently since been navigated in the same

(m) 1824, ch. 79, s. 16.—(n) *Fishmonger Company v. East India Company*, 1 Dick. 164; *Ripon v. Hobart*, 8 Cond. Chan. Rep. 331.—(o) 1784, ch. 33, s. 13.

manner, and to the same extent. (*p*) But, I apprehend, that the proof of a few such instances, in which small boats have been dragged up against the stream, through a portion of it, would not be deemed sufficient to give it the character of a navigable highway.

The Thames and the Severn, two of the largest rivers of England, which perhaps do not together pass a volume of descending water more than equal to that of the Potomac, are still deemed navigable streams above tide; and that, because although their currents may be rapid and their swells considerable, they are ordinarily navigated with so much ease and safety both up and down, that for time immemorial, and long before there was any such thing as a navigable canal in that country, there were towing paths along spaces of their margins, recognized by custom and by statute law, by means of which boats were drawn along by men or horses. (*q*)

Compared with those gently flowing streams the Potomac is a torrent; collecting its waters far west, from the rude mountain and high plashy glades; and swelling occasionally from fifteen to thirty feet, comes tumbling down through rocks abrupt, in a manner throughout, and at all seasons with a speed, and in some places with a headlong pitch, that holds in utter defiance every thing like navigation; except it may be in a few calm spaces. The documents, surveys, and plots submitted in this case exhibit the character of this river, in these respects, in a very striking point of view. (*r*) I, therefore, cannot think, that it was originally regarded as a navigable river through any portion of it, above tide, until it had been expressly recognized and declared, to some extent, to be so by a positive legislative enactment; (*s*) but even a navigable river is not a highway in the most extensive sense of the term. (*t*)

The act incorporating *The Potomac Company* seems, however, to be conclusive as to this point; it is entitled 'an act for establish-

(*p*) In a report made on the 30th of January, 1827, by a committee to the House of Representatives of Congress, No. 90, page 27, it appears, that John Balendine, in a communication published in 1773, says, he had had an experience of more than fifteen years in transporting merchandize up and down the river. And in page 73 of the same report, it is said, that the Ohio company of Maryland and Virginia in 1749, used the river for transportation.

(*q*) *Hale de Port. Maris* 86; *Nicholson v. Chapman*, 2 H. Blac. 254; *Miles v. Rose*, 1 Com. Law, Rep. 240.—(*r*) 'The Potomac is the most rapid of the great atlantic rivers,' per Gallatin's Rep. 1808, page 31.—(*s*) 1768, ch. 5; 1806. ch. 79.—(*t*) *Buszard v. Capel*, 13 Com. Law, Rep. 379; *Palmer v. Mulligan*, 3 Caine's Rep. 307; *Shaw v. Crawford*, 10 John. Rep. 237; *Hooker v. Cummings*, 20 John. Rep. 90.

ing a company for opening and extending the navigation of the river Potomac.' The avowed object of which, as appears by all its provisions, was to create a navigation where there was none before. (u) And the act incorporating *The Chesapeake and Ohio Canal Company*, in providing for the transfer of the right of property, from the one to the other of those companies, in this newly created navigation, declares, that the corporation shall 'keep the corresponding part of the river in a proper state for navigation, and in as good order as the same now is.' (w) These laws are the legislative enactments of Maryland and Virginia; and therefore, may be considered as the solemn recognitions of both, that this river, above tide, was not to be deemed, in all respects, a public navigable highway. And looking to the line of navigation to be created; and not to the river alone, the act incorporating *The Potomac Company*, declares, 'that the said river, and the works to be erected thereon, when completed, shall forever thereafter be esteemed and taken to be navigable as a public highway,' (x) not that the river itself and alone shall be so considered.

By the common law, a river not navigable in its natural state, if it shall be made so, by public authority, shall ever after be deemed a public highway; (y) but this river alone has not been made navigable and declared to be a highway. Taking this then, to be a private river not navigable, it follows, that the riparian holders of land would have an undoubted right to use the water in any manner, without injury to others. (z) And this right is expressly recognized by the act incorporating *The Potomac Company*. (a) But even supposing this to be a navigable river, and a highway, still the riparian holder of land would have a right to the use of its waters, with only one additional restriction; and that is, that he should not hinder, or injure the navigation. (b)

It was urged, that whatever may be the natural character of this river, above tide; and however it may have been regarded before the year 1785; that the compact made between this state and Virginia, on the 28th of March of that year, has finally established its

(u) 1784, ch. 33.—(w) 1824, ch. 79, s. 13.—(x) 1784, ch. 33, s. 10.—(y) Hale *de Jure Maris*, 9.—(z) Kame's Pri. Eq. b. 1, pt. 1, c. 1, s. 1.—(a) 1784, ch. 33, s. 11 and 13.—(b) Vattel, b. 1, s. 249, 272; Bealey v. Shaw, 6 East. 208; Weld v. Hornby, 7 East. 195; Williams v. Morland, 9 Com. Law Rep. 269; Wright v. Howard, 1 Cond. Chan. Rep. 95; Coulter v. Hunter, 4 Rand. 58; The river Delaware, between Pennsylvania and New Jersey, 49 Niles' Reg. 110, 298.

character, as a navigable river and highway, common to both states. (c)

The general scope and object of that compact was, not to fix and give a legal character to any natural subject whatever; in that respect it did not profess to alter, or to stipulate for anything; throughout it speaks of waters, which are by nature navigable; and regulates the terms and manner in which the natural navigation is to be conducted by the citizens of the contracting parties. The first nine articles cannot possibly be applied in any other way. The tenth establishes certain regulations respecting piracies, crimes, and offences, and for any violence, injury, or trespass, to or upon the property, or lands of the other adjacent to the said bay or river, &c. Piracy is a name given to no offence committed within the body of a county; but only to crimes upon bays and rivers, or any tidewater, considered as an arm of the sea, not within the body of a county; but originally and properly within the jurisdiction of the admiralty. This provision respecting piracy, therefore, clearly confines the whole article to acts done on tide-water, or abroad, and not within the body of any county; and of which the courts of common law could not otherwise have jurisdiction. The eleventh article speaks of the ports of the Potomac, certainly on tide-water, for there could be none above; and of persons flying from justice. This again, must have been upon the tide-water, and not within the body of any county; because the whole of the river, above tide, not being navigable, or a common highway, was within the bodies of the respective adjacent counties; and could afford no sanctuary to those who should flee from the justice of the municipal law; since they would be there fully within reach of process from the courts of common law of the state to which the river belonged. The twelfth article relates to the transportation of the effects of the citizens of each state across the river free of duty. But it could not be necessary to extend this provision higher than the tide; because a similar stipulation had been previously embodied in the act incorporating *The Potomac Company*. (d) There is, therefore, nothing in this compact, which relates in any manner whatever to the river Potomac above tide-water. (e)

(c) 1785, ch. 1; Tuck. Blac. Com. pt. 1, app. 310.—(d) 1784, ch. 33, s. 19.—

(e) Instructions to the Commissioners of Maryland, Votes and Pro. H. Deleg. 22 Dec. 1777; 1784, Resol. 22; 1785, ch. 1.

This compact, of the 28th of March, 1785, is confined exclusively to matters of jurisdiction and navigation; it leaves the territorial rights of the parties untouched. In rivers flowing through conterminous states, a common use is presumed; if there be no proof of a peculiar property excluding the universal or the common use. (*f*) But, in this instance, there is the most satisfactory evidence of an exclusive right. The boundary, called for in the charter to the lord proprietary of Maryland, is from 'the first fountain of the river Potomac, thence verging towards the south unto the further bank of the said river, and following the same on the west and south unto a certain place called Cinquack, situate near the mouth of the said river,' &c. (*g*) To the full extent of this call for the right bank of the Potomac, (*h*) Maryland has always held; and under that holding, all the islands in the river have been granted by patents issuing from the land office or under legislative enactments, or titles derived from this state; (*i*) and the whole of the bed of the river, above tide, it is believed, has always been admitted to be rightfully parcel of the territory of Maryland. Whether the south, or the north branch should be considered as the true boundary has long been, and still is, a matter of controversy; but, before the revolution, many patents for lands, lying between the north, and south branches, were issued by the lord proprietary of Maryland. (*j*)

Hence I feel perfectly satisfied, that the Potomac, above tide,

(*f*) Vattel, b. 1. c. 22; The Twee Gebroeders, 3 Rob. Ad. Rep. 339; Wright v. Howard, 1 Cond. Chan. Rep. 95; Handly's lessee v. Anthony, 5 Wheat. 379, Landhold. Ass. 170.—(*g*) Chart. Maryland, s. 3.—(*h*) This mode of designating the sides of our long and winding rivers is much more generally accurate than that used in the Charter of Maryland, or than that of north or south, east or west, and has for its sanction the highest classical authority. The river is personified and supposed to be looking and moving towards its outlet, when its banks are on its right and left hand; and, in reference to that supposition, they are so designated accordingly. Thus Horace, speaking of the Tiber says:

'Illic dum se nimium querenti
Jactat ultorem, vagus et sinistra
Labitur ripa, Jove non probante,

uxorius amnis'—*Carm.* lib. 1. od. 2.

Gibbon says, 'If we inquire into the present state of those countries, we shall find, that on the *left hand* of the Danube,' &c. 1 Gibbon Decl. of Rom. Emp. 26. Phil. Ed. And again he says, 'He was deprived of the country on the *right* of the Tiber.' 5 ib. 170.—(*i*) 1822, ch. 54.—(*j*) Landhold. Ass. 173. Proce. Conven. Maryland, 30th October, 1776; Resolutions 1785, No. 1; 1795, No. 3; 1796, No. 5; 1801, No. 10; 1806, No. 10; Foster and Elam v. Neilson, 2 Peters, 307; 3 Jefferson's Correspondence, 347; Votes and Proc. H. Del. 24th January, 1824.

was originally a private innavigable river; that it is now, in no other manner, and to no greater extent to be deemed a navigable highway than it has been expressly so declared, or than as it forms a part of the route of the navigation formed by *the Potomac Company*, which alone has been declared to be a highway, common to Maryland and Virginia; that the whole of the river, to its right bank, forms a part of the territory of the state of Maryland; that the whole of it above tide is entirely within the bodies of the respective counties of Maryland lying along it; and, consequently, that its waters above tide may be taken and used by any riparian holder of land, in any manner, without prejudice to others.

The sole object of the act incorporating *The Potomac Company* was to open a line of boat navigation, from the tide of the Potomac, along the course of the river itself as high up as practicable. All its provisions, with the exception of only two sections, (*k*) have relation to this object exclusively. And that private property might be in no respect capriciously dealt with, even for that great purpose, it appears, that the company, after they had once made a selection of the location of any canal or cut, forming a portion of the proposed new line of navigation, could not abandon it, and have other lands valued and condemned to them for the same purpose. If the canal, or the locks got out of repair, other land could not be taken, and condemned for making another canal, or new locks along side of the old. Because, there was one, and but one distinct provision made for any such condemnation. The power of condemnation given to this company, was not, in its nature, a continuing one, which might have been repeated at their pleasure; nor is there any thing, in their act of incorporation, which contemplates a repetition of it for any purpose whatever; when the authority, thus granted, was once exercised, the law thereby spent itself, and the power of the company, in that respect, was exhausted and gone, (*l*) and this intention is strongly manifested in that part of the incorporating act, which provides for the calling of a jury to make a further assessment for any damages that should arise, which 'had not been before considered and valued.' (*m*)

(*k*) 1784, ch. 33, s. 13, 19.—(*l*) *The King v. The Glamorganshire Canal Company*, 12 East. 157. S. C. 14 Com. Law. Rep. 112; *Blakemore v. The Glamorganshire Canal Navigation*, 6 Cond. Chan. Rep. 544; *Groszler v. The Corporation of Georgetown*, 6 Wheat. 593.—(*m*) 1784, ch. 33, s. 11.

This power to condemn private property, is a portion of the *eminent domain* of the government, granted to this body politic, which should never be exercised by the government itself, but with great caution, and in cases most obviously for the public good. When, as has been justly observed in our country, the legislature undertakes to give away what is not their own, when they attempt to take the property of one man, which he has fairly acquired, and the general law of the land protects, in order to transfer it to another, even upon a complete indemnification, it will naturally be considered as an extraordinary act of legislation, which ought to be viewed with jealous eyes, examined with critical exactness, and scrutinized with all the severity of legal exposition. An act of this sort deserves no favour; to construe it liberally would be sinning against the rights of property. (*n*) In England, it has been said that all courts have, for obvious reasons, at all times, construed such legislative enactments most strictly. Whatever such enactments require to be done, as a condition precedent to the extraordinary right of making roads or canals over private property, has always been exacted to the letter, and the party omitting has been held a trespasser. (*o*)

From which it follows, that, although the works of the company may be repaired, or any thing may be done to render them more safe, substantial and perfect, yet no additional extent of land can be taken, nor can any canal, or other work be, in any way, altered, remodded, shifted in its location, or enlarged, so as to be spread out beyond the extent of the first selected purchase or condemnation.

Now, recollecting what it is, that constitutes a natural mill-site on the margin of a descending stream; the peculiar character of this river; and, the general tenor and scope of the act incorporating *The Potomac Company*, we shall find ourselves properly prepared to undertake the consideration of that section of it, which is in these words:

‘And whereas, some of the places through which it may be necessary to conduct the said canals may be convenient for erecting mills, forges, or other water works, and the persons, possessors of such situation may design to improve the same; and it is the intention of this act not to interfere with private property, but for the purpose of improving and perfecting the said navigation, *Be it*

(*n*) *Vanhorne's lessee v. Dorrance*, 2 Dall. 318.—(*o*) *Keppell v. Bailey*, 8 Cond. Chan. Rep. 118.

enacted, that the water, or any part thereof, conveyed through any canal or cut made by the said company, shall not be used for any purpose but navigation, unless the consent of the proprietors of the land, through which the same shall be led be first had; and the said president and directors, or a majority of them, are hereby empowered and directed, if it can be conveniently done to answer both the purposes of navigation and water works aforesaid, to enter into reasonable agreements with the proprietors of such situation concerning the just proportion of the expenses of making large canals or cuts, capable of carrying such quantities of water as may be sufficient for the purposes of navigation, and also for any such water works as aforesaid.' (p)

The great object of this law was the formation of a new line of navigation; but here a new subject is introduced; mills are provided for in connexion with certain canal portions of that line. 'Some of the places, it is said, through which it may be necessary to conduct canals, may be convenient for erecting mills.' Any place on the margin of this stream, at all convenient for erecting a mill, must have the qualities which has been described; for, although it may be said, that this expression may refer to the middle of the river, or any place through which a canal may be conducted, of which there may be a great number and variety along the line of this new navigation; yet, in this case, we are not allowed to take any such range; because, the claims of this plaintiff are expressly confined to that space of land on the left bank of the river, extending from the head of the little falls to tide. Therefore, this expression, so far as regards the claim of the plaintiff, cannot possibly refer to any other kind of mill-sites, than such as have been described and designated by the diagram A B C. The places spoken of are such only as have the natural qualities of mill-sites; they are not such as the new work may make convenient for erecting mills, but such only as were so naturally at that time.

Again, it is said, that 'the persons possessors of such situation may design to improve the same.' Whence it appears, that the subjects spoken of are naked natural mill-sites; not any situation on which a mill has been erected; but merely those which the owner 'may design to improve;' and it must have the qualities which have been shewn to belong to such a natural mill-site; for, otherwise it cannot be regarded as a place 'convenient for erecting

a mill,' or as such a situation which the owner 'may design to improve.' The sort of place spoken of is, thus, clearly specified and ascertained; and the owner is described, as 'the person possessor of such a situation;' that is, as a person who is the possessor of a mill-site. But a natural mill-site may exist, and yet no one, or any two or more individuals may be the legal owners of it; because, a natural mill-site being incapable of division, if any portion of the land necessary for the head and tail race, and the position of the mill be separated from the rest, by being held in severalty by different owners, there exists, in fact, no legal right in any one to such natural mill-site. And certainly the legislature could never be understood to say of any one, 'that he may design to improve,' any property to which he has no legal right, in any way it might be improved, if other parcels were united with it, and the whole were held altogether by one and the same owner.

This plaintiff founds his claim, under this section, upon the fact of his being one of the 'persons possessors of such a situation.' But, it appears, that this large tract of land binding on the river Potomac, from the little falls to tide, was originally granted by the state in distinct parcels to different persons; that it has undergone since several divisions, and re-unions; and that it does not appear, from any thing in the case, to what separate parcel this plaintiff is entitled; nor does it appear, whether the parcel he owns is sufficient to constitute a mill-site; and was so held by him, or those under whom he claims, at the time this act was passed, without any division, or alienation of any of its necessary constituent parts, since that time; nor is there any thing in the case which shews who were the possessors of mill-sites in the year 1784, or when this suit was instituted, or at any other time.

'It is the intention of this act, not to interfere with private property, but for the purpose of improving and perfecting the said navigation.' The kinds of 'private property,' here referred to, were the unimproved mill-sites, which had been previously designated. This act, by means of the work, which it gave authority to construct, could interfere with a mill-site in only one of two ways; either by preventing the water from reaching it, or by occupying the whole, or a material portion of the very mill-site itself. These two modes of interference could be effected by only one kind of work; that is, by a canal; because, this sentence must be taken in connection with its context; and then it must be read thus, at places through which it may be necessary to conduct ca-

nals, they, the canals, may interfere with mill-sites, with which it is the intention of this act not to interfere, but for the purpose of navigation, unless with the consent of the proprietors. Consequently, if the new navigable canal interfered with a mill-site, either by diverting the water from it, or by occupying its place, there were but two modes of redress left to its owner. Either to accept an equivalent in money to be agreed upon by the parties, or to be settled by a jury; or to have the canal itself appropriated as a head-race to it; and thus save it to himself, and for the benefit of the public. To give the possessors of mill-sites this latter choice, subject to certain restrictions, was the sole object of this section, and none other. And accordingly, with this intention the legislature proceeds to enact:

‘That the water, or any part thereof, conveyed through any canal or cut made by the said company, shall not be used for any purpose but navigation, unless the consent of the proprietors of the land through which the same shall be led be first had.’ The general tenor of the act had confined all the operations of the company to the formation of a new line of navigation; and here, that restriction, in accordance with the whole spirit of the act, is distinctly expressed and repeated, as is evident, with no other view than to ingraft upon it an exception. The water of the river, it is declared, ‘shall not be used for any purpose but navigation;’ this is the general rule, then comes the exception, ‘unless the consent of the proprietors of the land through which the same shall be led be first had.’ This is the exception and condition upon which the water of the river may be used for mills as well as for navigation. ‘The consent of the proprietors must be first had.’ If it can be had, then it appears, that the corporation, as well as the proprietors, may use the water for mills; or they may jointly participate in making that use of it. But, if the proprietors maliciously or capriciously withhold their consent, the corporation must submit; for, no power is given to it, in such case, to have the property valued and condemned to any such use. The will or consent of the proprietors is not, in this respect, subject to the slightest control, they are left perfectly free to consent or not at pleasure.

‘And the said president and directors, or a majority of them, are hereby empowered and directed, if it can be conveniently done, to answer both the purposes of navigation and water-works aforesaid, to enter into reasonable agreements with the proprietors of such situation concerning the just proportion of the expenses of

making large canals or cuts, capable of carrying such quantities of water as may be sufficient for the purposes of navigation and also for such water-works as aforesaid.' The first condition upon which an application of water may be made to mills, as well as to navigation, is the consent of the proprietors. But, supposing that to be given, still, there are other conditions of the most grave importance, which must all be complied with, before any water can be taken from these canals for mills. The company are empowered and directed to do so, 'if it can be conveniently done to answer both purposes.' This allows to them an extent of discretion, which cannot be duly appreciated without adverting to the consequences of making a navigable canal tributary to mills as their head race.

The application of water as the propelling power of mills, requires that it should flow in currents, no matter how rapid, so it does not inundate the position of the mill; but the perfection of a navigable canal is, that the water it contains should be entirely motionless. The one use requires quick motion, and the other stillness. Hence the unlimited application of the same volume of water; or rather the having of water conducted along a cavity to answer both purposes is absolutely and directly incompatible. (q)

To illustrate this, we must again recur to the diagram. Let A D be the navigable canal twenty-five feet wide, and two feet deep, made tributary to mill-sites as a head race. Suppose the whole line from 4 to D, affords sites for mills; and that, within that space, there is room for the erection of forty mills; then suppose that the dimensions of the canal constructed, be 'capable of carrying such quantities of water as may be sufficient' for twenty mills only. It follows, that one-half of the mill-sites cannot be occupied; and that the other half must totally annihilate the navigation. But, if the draft from the canal for mills be of such a volume as to give a rapid motion to the waters, the navigation, in one way at least,

(q) 'One great and fatal error has been interwoven into the scheme of the other canals, excepting only that of the Potomac. They have been dug as much with a view to the erection of mills, as to the purposes of navigation. To fit them for mill-races, their descent is rapid, and their current strong. They are liable, of course, to the variation of the quantity of water in the river; they bring down with their current, the alluvium of the river; bars are formed in them, as well by this alluvium, as by the land wash; and their banks, where they are not of rock, or walled, are liable to perpetual wear by the current. The canal is, besides, itself an inconvenient rapid to those who would ascend it.'—Per Latrobe, Report of A. Gallatin, Secretary of the Treasury, on Roads and Canals, 1808, page 86.

must be greatly hindered and retarded ; and so far the two uses of the water are also incompatible. It is to that incompatibility of those two uses, when exercised without limit, to which this law here alludes ; and it is that matter which it was the intention of the legislature to submit to the sound discretion of the corporation. (r)

Hence, I feel satisfied, that by this expression, 'if it can be conveniently done to answer both purposes,' this body politic has been clothed with as perfect a freedom of will and discretion, as that reserved to the proprietors ; because, even if the corporation should refuse to 'enter into a reasonable agreement,' the proprietor would not be without redress ; since the law has provided for him an adequate mode of obtaining compensation for his property ; and because, if the corporation were held to be under any sort of obligation, such obligation would place it in the power of the proprietors to subject the body politic to such a judicial control as might defeat the principal and great object itself. It being then a matter entirely at the pleasure of the corporation to enter into such reasonable agreements as they might think proper ; and no contract appearing to have been made with this plaintiff, or any one under whom he claims, the court finds this company under no kind of legal obligation which it can command them to fulfil.

In the preamble to this section, it is declared, that 'some of the places, through which it may be necessary to conduct the said canals, may be convenient for erecting mills.' And here, it is said, that reasonable agreements may be made 'with the proprietors of such situation concerning the just proportion of the expenses of making large canals or cuts.' The whole law, from beginning to end, speaks of but one line of navigation ; it affords all the powers necessary to make that one line, but no more. Canals and cuts are parts of the line ; and they are directed to be twenty-five feet wide, and four feet deep ; (s) which were deemed sufficient for all the purposes of the contemplated navigation. It was not deemed necessary to give to the corporation authority to make larger canals for that purpose ; or to alter the route of a canal ; or to enlarge it after it had been made.

(r) The Bridgewater Canal, and the Dearne and Dove Canal, in England, have tumbling bays, and guage wiers for mills, and for watering meadows.—*Rees' Cyclo.* art. *Canal*.—(s) 1784, ch. 33, s. 17.

The 'making large canals,' therefore, can only mean such as were to be made originally, and in the first instance. If the proprietors and the company could agree 'concerning the just proportion of the expenses,' those canals, when about to be laid out, were to be made to suit both objects, instead of that one only, the necessary dimensions for which are specified; that is, if upon agreement any increase in the specified dimensions of the canal to answer the additional purpose should be determined upon, an estimate of the expense was to be made; and 'the just proportion of the expenses of making large canals or cuts capable of carrying such quantities of water as may be sufficient for the purposes of navigation, and also for any such water works,' as the proprietors of the mill-sites might desire to erect, should be then finally ascertained. The two purposes were to be answered at once, and in the beginning by their 'making large canals.' How large over and above that which was declared to be sufficient for navigation alone, is no otherwise specified, than by declaring, that it should be 'capable of carrying such quantities of water as may be sufficient for both purposes.'

Hence, it is perfectly manifest, that the legislature had meditated upon the incompatibility of answering the two purposes, of navigation and mills, to an unlimited extent from the same canals; and had guarded against it by thus unequivocally declaring, that the canal should be commensurate to both purposes. The legislature did not leave it in the power of any proprietor of land, by withholding his consent, or refusing to enter into a reasonable agreement, to prevent the corporation from making a canal of the specified dimensions for navigable purposes; for, to meet any such opposition, it is provided, that a jury may be called and his land condemned; because the new line of navigation being a highway, and dedicated to public uses, such condemnation might rightfully be made, by virtue of that *eminent domain*, which has been tacitly conceded to the government over all private property.

But although a great and eminent balance of good to the public has authorised the violation of private property under every mode of government in the world; (t) yet, in such cases, even the greatest of despots has been irresistibly struck with the justice of the demand for an adequate compensation. (u) But the construction of mills, the enhancement of the value of private property, and the aggrandisement of individuals alone, without any view to the pub-

(t) Godwin's Pol. Just. b. 3, c. 3.—(u) Tacitus Ann. b. 1, s. 75.

lic good, are certainly not such causes as can alone justify the exercise of the government's power of *eminent domain* over the property of any one. (v) And therefore it was, that no power was given by this law to have any private property condemned for the use of any mill, or to subserve the purpose of any water-works, which any individual, for his own private emolument, might be willing to associate with the canal to be constructed by *The Potomac Company*. The additions, to the specified canal, for all such purposes, were to be obtained by reasonable agreements; and in no other manner whatever; if they could be conveniently made in that way to answer both purposes, this section allowed it to be done; if not, no condemnation was to be suffered at any time, for any such purpose.

But supposing the right to condemn granted to this corporation, it must have been intended to provide for the erection of mills in connexion with the canal. Then it is evident, that both purposes must be comprehended in the original formation of those canals; and the acquisitions of the company for that purpose. The law nowhere, by any express words, or by any fair construction, authorises the company to make any new and additional acquisitions along the line of navigation formed by them, even for the purpose of that navigation; much less for mills, or any other, or additional purpose. But the erection of mills, to which the canal is made tributary, as a head race, necessarily requires the 'making large canals, capable of carrying such quantities of water as may be sufficient for both purposes;' and, consequently, if they have not originally that capacity, they must be enlarged before mills can be supplied from them.

This canal, it is admitted on all hands, has no more than the specified dimensions of the required navigable canal; and, therefore, if the plaintiff's claim is to be gratified to any extent whatever the canal must be enlarged; and its capacity for carrying an adequate additional quantity of water provided for in some way. This, I apprehend, can only be effected by additions, in one of three modes; by adding to its width, to its depth, or to its height. We have only to cast an eye over the plots filed in this case, to see, that if it is to be widened, the corporation must, for that purpose, acquire an additional breadth of land on one or on each side.

If it is to be raised then, on reverting to the diagram, it will be seen, that supposing the canal A B, to be the head race, it can only be effected by a dam A 2, or an elongation of the canal to 1, and in either case, the absolute right in the land itself, or the right to flood the land A 2 1, must be acquired by the corporation. Again, if it is to be deepened, then the excavation at A, must be such as to draw off the water from the land A 2 1, to its prejudice; and consequently, a right to do so, or a clear title to the land must be acquired by the company. Every possible way then, of enlarging the canal, after it has been once formed, necessarily implies a new acquisition of property by the company. But the act of their incorporation, has given them no power whatever to purchase and hold, much less any authority to take from others, and have condemned to their use any property, or franchise whatever to be applied to any such purpose. (w)

That this is the correct construction of this law is strongly sustained by the express provisions of an act passed at the then next preceding session of the General Assembly, upon a subject, in all respects, precisely similar; which act after constituting certain persons a body politic, by the name of *The Proprietors of the Susquehanna Canal*, for the purpose of constructing a canal as described, declares, that 'it is necessary for the making the said canal, and erecting grist-mills and other water-works thereon, that provision should be made for condemning a quantity of land not exceeding two hundred acres.' And it then proceeds to enact accordingly. (x) But in this act incorporating *The Potomac Company*, no such provision has been made in any form. And it is also worthy of remark, that the eleventh section of the act incorporating, *The Pocomoke Company*, (y) appears to have been copied verbatim from the thirteenth section of the act incorporating *The Potomac Company*, neither of which contains any provision for erecting water-works similar to that of the act incorporating *The Proprietors of the Susquehanna Canal*.

Much has been said about the surplus water and the waste water of the canals of *The Potomac Company*, as evidence of its being the intention of this law, that the adjacent and riparian owners of land should be allowed to draw such a quantity of water from it as might be necessary for any mill they might wish to erect; and of

(w) *Blakemore v. The Glamorganshire Canal Navigation*, 6 Cond. Chan. Rep. 550.—(x) 1783, ch. 23, s. 6.—(y) 1796, ch. 17.

the right to such waters, which the owners of the land, over which they have been suffered to flow, have acquired by a kind of prescription. It must be recollected, however, that the phrases 'surplus water,' and 'waste water,' are nowhere to be found in the act incorporating *The Potomac Company*; and that, in using those expressions, facts are referred to, which are not mentioned at all in that law.

It appears, among the circumstances of this case, that the canal which this plaintiff has claimed the right so seriously to incumber, if not to destroy as a navigable passage, by drawing off its waters to mills, has not been in any manner protected at its upper entrance from the wild ungovernable river, with which it is connected; the freshets of which rise from fifteen to thirty feet above its low summer level. In consequence of which, the canal, like its fountain, the river, has its seasons of bursting fulness and of comparatively low small volume. Left so exposed to the violences of the river, it is by no means extraordinary, that there should be in the canal a multitude of leaks, cracks, and rents from which great sluices of water are continually gushing out. These escapes from the canal may well enough be called 'waste water;' and they afford very satisfactory evidence of the improper exposure and imperfect structure of the canal; but it seems to be a mistake to summon them up as proofs of there being a regular amount of 'surplus water' in it, sufficient for mills. They are facts, which prove, that the canal has been very rudely and injuriously intruded upon by the river, for want of guard-locks at its upper entrance, and nothing more. Indeed so far from affording any evidence, that the canal has a capacity to carry water sufficient for mills, as well as navigation, they are proofs, that, for want of a guard-lock at its inlet, it is alike unsafe and dangerous to both, since the swollen torrent, which obstructs navigation, might sweep a mill to destruction, by the same kind of force which rends and prostrates the banks and mounds of the canal itself.

But it seems to be a still greater mistake as to the nature and causes of these issues and sluices, to cite their long continuance as furnishing a presumption, that the owners of the land, over which they flow, have a right to consider them as permanent streams on which they may erect mills. Presumptions of fact are conclusions drawn from particular circumstances. They are such inferences as are found by experience to be usually consequent upon or coincident with certain known facts. A presumption of right always

supposes some tacit, or implied admission of him against whom it is brought to bear, that the title claimed is well founded. The principles of common law presumptions arising from lapse of time, and those statutory limitations which have been introduced to quiet the rights of individuals, are among the most balmy principles of the law, and should always be highly respected. (a) Before a presumption of right can, however, be founded upon the continuance of certain circumstances during any length of time, it must be shewn, that such circumstances necessarily involve an admission of the right of him by whom it is claimed. There must appear to be such an obvious connexion between the circumstances, and the right, that so soon as the circumstances are established an irresistible inference immediately arises that the right as claimed must also exist. (b)

But the fact of there being rents in a canal affords a just foundation for presuming, that it has been badly constructed; or that it is exposed to such floodings as to diminish its utility and make it very expensive to its owners. It by no means follows as a fair consequence from such facts, or from their long continuance, that the owners of the canal had made such sluices, or suffered them to continue with an implied or tacit understanding, that they might be considered as constant streams applicable to mills. There is no obvious or natural connexion between such circumstances and the existence of such a right in any form; nor has such a right been found by experience to be usually consequent upon, or coincident with any such known facts. The continuance of such circumstances does not, in any manner, involve an admission of any such right; nor do they stand in the slightest degree related as cause and effect. If the canal had been protected, as it ought to have been, by a guard lock at its inlet, its supply of water would have been regular; it might have been made perfectly close every where, and there would have been no waste or apparently surplus water gushing from its sides. These presumptions urged by the plaintiff are, therefore, wholly unfounded. From all which it is perfectly clear, that this act incorporating *The Potomac Company*, has neither given nor reserved to this plaintiff, or to any proprietor of land, any shadow of right, independently of any express agree-

(a) *Dudley v. Dudley*, Prece. Chan. 249; *Charlwood v. Morgan*, 1 New Rep. 66; *The Rebecca*, 5 Rob. Ad. Rep. 104; *Lingan v. Henderson*, 1 Bland, 272.—(b.) 1 Ev. Pothier Ob. 472; 2 Ev. Pothier Ob. 119; 4 Stark. Evi. 1234.

ment, of which there is no allegation or proof of any having been made, to make any portion of the navigable canal, constructed by that company, tributary to any mills or water-works, or to draw water from such canals for any purpose whatever.

This plaintiff, after having presented himself as the legal owner of certain natural mill-sites; and as the claimant of certain privileges with which the property of these defendants stand charged; and endeavouring to sustain his right to have that property, and those privileges protected by the conservative process of this court, now assumes a new and entirely different garb, and comes before the court as one of the society, and a collegiate brother of the defendants. He alleges, that he is a stockholder of the body politic, called *The Chesapeake and Ohio Canal Company*; that the corporation themselves, or their president and directors are expending the funds of the institution in a manner not warranted by law; and are erecting works, and extending them to points beyond the assigned limits, to answer purposes, and subserve interests entirely alien to the great objects of the act of incorporation, and altogether at variance with the authority conferred by it, which operations, the plaintiff complains, will work a fraud upon him, and result in the most irreparable injury to his property and rights as a stockholder in the company. And he thereupon prays, that these defendants may be restrained by an injunction from thus illegally misapplying those funds.

The defendants meet and oppose this complaint; *first*, on the ground, that the works, projected and now in part executed, were expressly authorized by the whole corporation, at a general meeting, to which all the stockholders were regularly called, and this plaintiff among the rest; which determination of the corporation, in general meeting, must be deemed final and conclusive; *next*, on the ground, that the erecting and extending the works, in the manner projected, being altogether within the District of Columbia, is a matter which belongs exclusively to the government of that District; and, having been heretofore submitted to a legal and competent tribunal there, by which the formation of them had been decided to be legal and proper, this court can have no jurisdiction of the matter in any way whatever; and *lastly*, upon the ground, that the erection and extension of the works as planned, and in part executed, are in violation of no law, and have been authorized by the express provisions of their act of incorporation.

The validity of the first of these grounds of defence must de-

pend upon the extent to which the resolutions of this corporation are to be deemed final and conclusive; or, how far this court can exercise over bodies politic of this, or any other description, a superintending and controlling authority. It must be constantly borne in mind, that all corporations are artificial beings who have all the capacities and faculties of natural beings to the full extent of the powers vested in them by the express terms of their incorporation; and also of such other powers as are necessarily incident to those expressly granted. Each corporation, whether sole or aggregate, or however constituted, is and must be, from its nature, an artificial being, in itself altogether separate and distinct from that of any one, or any aggregation of natural persons of whom it is constituted. The internal government of many of the corporations of England is exercised subject to the superintendence and control of the visitor, who is, most commonly, the private founder or donor of the funds with which it deals. This visitatorial power, in the hands of private persons, is exercised in a summary or arbitrary manner, and being liable to abuse, is therefore never encouraged or extended. (c) But where there is no special visitor, which is commonly the case with all civil corporations, the visitatorial power is exercised, in England, by the Court of King's Bench, by means of a *mandamus*, or information; (d) and here, in like manner, by the courts of common law having original jurisdiction.

In this instance, the object is to control this company in the disbursement of its corporate funds, on the ground, that they are not applied to corporate purposes, or in the manner authorized by the act of incorporation. It is said, that according to the civil law, the rights of bodies politic over their corporate property is like that of minors; and that they cannot be permitted to dispose of it in any way to the prejudice of the institution. (e) But, according to the common law, it is otherwise; for it is laid down as an incident of all bodies politic, that corporate property may be encumbered, applied, or aliened, by its full and regular assent, in any manner, and for any purpose whatever; the will of the artificial body, as of a natural body, in all such cases, being the law, and standing in the place of any reason for so doing. This uncontrollable right of alienation, in the case of ecclesiastical corporations, in England,

(c) Attorney-General v. Middleton, 2 Ves. 328.—(d) 1 Blac. Com. 481.—(e) Vattel, b. 1, s. 247.

was productive of such evils, as occasioned a check to be put upon it by what are, there, called the disabling statutes ; but, as to all other corporations, the common law rule is still in force. (*f*) There are many cases to be met with, and some of a very complicated nature, where a single corporator has by bill in equity called the corporation itself to account, in order to obtain his due share of rents and profits ; (*g*) and also where the body politic itself has, by bill, asked to have relief against its own directors, officers and servants, in respect of their frauds, mismanagement, or breaches of trust. (*h*) But this is the first instance, in this court, in which a member has charged the body politic itself with making expenditures not for corporate purposes ; and, on that ground, prayed to have it prevented from doing so by injunction.

It is said, that, in this case, such a restriction may be imposed ; because, the state is a stockholder ; and, therefore, that the public is peculiarly interested in the proper application of the corporate funds. But if the republic condescends to become a dealer in stocks, and to place herself upon the foot merely of a corporator, or member of an incorporated company, she must, by so doing, be presumed to have consented to have her funds so invested, subjected to the same management, and made liable in the same manner, and to the same extent as those of the individual corporators with whom she has become so associated. (*i*)

It seems to follow as a just, and necessary consequence, from the very nature of delegated and limited powers, with which kind of authority alone this corporation has been invested, that there ought to be, and must exist somewhere a superintending authority to restrain and confine the exercise of such powers within the limits assigned to them. Within the scope of its general and discretionary powers, the authority of the corporation to dispose of its funds, for any purpose whatever, may be admitted to be absolute and beyond all control. But, if property be given to a body politic for certain specified and limited purposes, any application of it to an obviously different object is a violation of the law ; and consequently, expenditures not for corporate purposes, in whatever

(*f*) Co. Litt. 44. 300 ; Com. Dig. tit. Franchise, F. 18.—(*g*) *Adley v. The Whitstable Company*, 17 Ves. 316. S. C. 1 Meriv. 107.—(*h*) *The Charitable Corporation v. Sutton*, 9 Mod. 350 ; S. C. 2 Atk. 400 ; *Drewry v. Barnes*, 3 Cond. Chan. Rep. 311.—(*i*) *U. S. Bank v. Planters Bank*, 9 Wheat. 907 ; *Towson v. The Havre de Grace Bank*, 6 H. & J. 52.

way they may have been authorized by the body politic, may be enjoined and prohibited. (j)

It is therefore conceived, that this resolution of *The Chesapeake and Ohio Canal Company*, by which these projected and in part executed works were directed to be made, is not such a final judgment of this body politic itself, as precludes this court from taking cognizance of the matter, and determining, whether the application of the funds, to defray the expense of such works is an expenditure for corporate purposes within the true meaning of the act of incorporation or not.

The next ground of defence is, that the extended works complained of, are altogether within the District of Columbia; the government of which, as regards this matter, being independent of, and alien to this republic, this court, therefore, can have no jurisdiction of the matter. It is said, indeed, that a judgment has in fact been pronounced by a legal and competent tribunal of the District of Columbia; but, that is of no importance, according to the broad ground taken by the defendants; for, if this court has no jurisdiction; because the matter belongs exclusively to the judicial authority of the government of the District of Columbia, then it follows, that this court is alike precluded, whether the tribunals of that government have already, or may hereafter adjudicate upon the subject.

So far, *The Chesapeake and Ohio Canal Company* has been considered as a body politic, deriving its corporate capacity altogether, and exclusively from the State of Maryland; as one of the artificial legal entities of this republic; and as standing fully and in every respect within the jurisdiction of this court. But here, an exemption from the jurisdiction of this state is claimed, on the ground, that it owes its existence to other governments as well as to this; and that its works do, in fact, compose a part of the territory belonging to those other governments, over which territory this court can exercise no authority whatever. It is believed, that this matter has never before been submitted to the consideration of any of the courts of this country; and yet it presents important ques-

(j) *Child v. Hudson's Bay Company*, 2 P. Well. 207; *Attorney-General v. The Governors of the Foundling Hospital*, 2 Ves. Jun. 43; *The Mayor and Commonalty of Colchester v. Lowten*, 1 Ves. & Bea. 226; *Gray v. Chaplin*, 1 Cond. Chan. Rep. 451; *Bromley v. Smith*, 2 Cond. Chan. Rep. 5; *Blain v. Agar*, 2 Cond. Chan. Rep. 19; *Hichens v. Congreve*, 3 Cond. Chan. Rep. 796; *The People v. The Utica Insurance Company*, 15 John. Rep. 358.

tions, as to jurisdiction, which may, in the progress of things, frequently arise, since there have been many bodies politic created, like this, by the concurrent acts of several state governments with property lying, or extending beyond the jurisdiction of each one of its creators. In Maryland there have been several canal, bridge, and turnpike-road companies constituted in this manner. (*k*)

The legislative enactment of Maryland, by which *The Chesapeake and Ohio Canal Company* has been incorporated, distinctly authorizes, so far as it can give any such authority, the extension of its works beyond the confines of this state; and over territory belonging to other, and, in this respect, independent and unconnected governments. Each of which has communicated to it the same powers. *The Chesapeake and Ohio Canal Company* must, therefore, be regarded as a corporation, one and indivisible in its nature; yet as a body politic which stretches itself, in an unbroken line, under the separate jurisdictions of several governments; holding and occupying portions of the territory of each; and as an artificial being formed by an infusion of the spirit and power of all. According to this constitution of its existence, it has received its funds, makes all its expenditures, and must hold its estate. To ascertain whether, in point of fact, any of the disbursements of this body were for corporate purposes or not, it would seem to be proper to dismiss from the inquiry every consideration as to the different sources from which it deduced its existence; and simply to determine, whether the authority to make the expenditure was given by the act of incorporation or not; taking it to be a law of one single government only.

The question here presented, however, is not whether the expenditure is for corporate purposes or not; but one preliminary to that, which is, whether the determination of that question belongs exclusively, or to what extent, to the judicial authority of any one of the governments by which this single corporation has been erected?

No court of justice can act upon any controverted matter where both the person and the thing are beyond its reach; and every tribunal, not acting under the law of nations, has some local limits to its jurisdiction; indeed those which have been charged with the administration of justice, under our common law code, have a very special and peculiar reference and adaptation to the territorial divisions of the state. (*l*) But the jurisdiction of the High Court

(*k*) 1799, ch. 16; 1809, ch. 64; 1813, ch. 126; 1815, ch. 33; 1818, ch. 73; 1829, ch. 42, 67.—(*l*) Kame's Prin. Eq. b. 3, c. 7.

of Chancery over the matters of which it takes cognizance is co-extensive with the confines of the state itself. According to its original constitution, it could act upon the person only; but its powers have been, in many respects, so enlarged as to enable it to act also upon the subject in controversy; and it has been specially authorized to use the executive and coercive process of the common law. (m) Thus braced and armed it possesses powers and means to afford redress in almost every case, not exclusively belonging to the courts of common law, or in which they are so constituted as to be able to give adequate relief. Wherever a person is to be found within reach of the Court of Chancery, and he may, in any respect, be considered as a trustee, or the matter in dispute arises out of a transitory personal contract, not necessarily involving the title to, and following land; and which the party may, by personal coercion, be made to execute specifically, this court may have jurisdiction and decree accordingly. Therefore, if a defendant be found here he may be decreed to pay money, or to account for the rents and profits of lands lying in another, or a foreign country, which he had held and enjoyed; or if a deed of lands in a foreign country be found to be fraudulent, it may be ordered to be delivered up and cancelled; or in specific performance of a contract for land in another state, such a conveyance may be ordered as shall be sufficient according to the law of the state where it lies. But the court will not decree a partition of such land, or in any manner directly decide upon the title to it, or upon the validity of a deed or will as a material part of the title; nor found the relief granted upon the strict title to such property itself. (n)

The whole estate of *The Chesapeake and Ohio Canal Company*, at least so far as it consists of the canal itself, and its necessary buildings, and the fixtures attached to them, must, according to the common law, be regarded as reality; (o) and it was so consi-

(m) 1785, ch. 72, s. 23, 25.—(n) *Cartwright v. Pettus*, 2 Ca. Chan. 214; *Arglasse v. Muschamp*, 1 Vern. 75; *Kildare v. Eustace*, 1 Vern. 419; *Toller v. Carteret*, 2 Vern. 494; *Fryer v. Bernard*, 2 P. Will. 261; *Derby v. Athol*, 1 Ves. 203; *Penn v. Lord Baltimore*, 1 Ves. 444; *Roberdeau v. Rous*, 1 Atk. 544; *Foster v. Vassall*, 3 Atk. 589; *Ex parte Marchioness of Annandale*, Amb. 80; *Pike v. Hoare*, Amb. 428; S. C. 2 Eden, 182; *Cranstown v. Johnston*, 3 Ves. 170; In the matter of the *Duchess of Chandois*, 1 Scho. and Lefr. 301; *Lord Clive's Jaghire*, 1 Coll. Jurid. 181; *Massie v. Watts*, 6 Cran. 158; *Guerrant v. Fowler*, 1 Hen. and Mun. 4. (o) *Co. Litt.* 19, 6; *Drybutter v. Bartholomew*, 2 P. Will. 127; *Buckeridge v. Ingram*, 2 Ves. Jun. 652; *Ram. on Assets*, 184.

dered by the original act of incorporation; but by a subsequent enactment, it has been declared, that it should be deemed personal property. (*p*) The right to land is, and necessarily must, be regulated by the law of the government under which it is situated. Mere moveables are generally allowed, by the comity of nations, to be disposed of according to the law of the place of the owner's domicile. (*q*) The reason why land must be governed by the law of the country where it lies, does not arise, in any manner, from our common law distinction between real and personal property; but, from the principles of international law, which regards land as a portion of the habitation of the nation; and which, from its fixed and immovable nature as such, must, of necessity, be absolutely and altogether regulated by the nation to whom it belongs. And therefore, a conveyance or will of land, a mortgage or a contract concerning such as canal stock must all be sued upon in Maryland, and the local nature of the thing requires them to be carried into execution here. (*r*) It would seem, however, that in a work of the kind now under consideration, if tolls are appointed to be gathered at a place within the jurisdiction of either of the governments, for the use of a space of canal, a part of which extends beyond its limits, such toll might be considered as forming a portion of the product of the canal property within the jurisdiction of the government where they were gathered. (*s*)

Hence, it appears, that directing the estate of this corporation to be deemed personal property, can amount to no more than declaring, that it shall be governed by the municipal regulations of the country where it lies in relation to personal property, instead of those relative to real estate; but that it must, nevertheless, be governed by those laws, and none other, as being an immovable portion of the habitation of the nation. These principles of public law, in regard to the immovable property of this corporation lying beyond the confines of this state, bring us back to the question, whether this court can exercise any jurisdiction in relation to such property, and to what extent.

(*p*) 1827, ch. 61.—(*q*) 1 Mad. Chan. 626; Kam. Pri. Eq. b. 3, c. 8, s. 3; Dixon v. Ramsay, 3 Cran. 319; De Sobry v. De Laistre, 2 H. & J. 224.—(*r*) Vattel, b. 2, s. 83; Kam. Pri. Eq. b. 3, c. 8, s. 2; Lord Clive's Jaghire, 1 Coll. Jun. 188; Bligh v. Darnley, 2 P. Will. 622; Calvin's case, 7 Co. 36; Robinson v. Bland, 2 Burr. 1079; The King v. The Dock Company of Hull, 1 T. R. 219; The Commonwealth v. Martin, 5 Mun. 120; *Ex parte* Horne, 14 Com. Law. Rep. 106;—(*s*) Drybutter v. Bartholomew, 2 P. Will. 127; The King v. The Aire & Calder Navigation, 2 T. R. 666; The King v. The Mayor of London, 4 T. R. 21.

Although the power of our government constitutionally to create a corporation beyond its jurisdiction, or to confer the rights and privileges of a body politic upon any but its own immediate citizens, so as thus to give an extra territorial operation to its legislative enactments, may well be doubted; yet the establishment of a body politic, clothed with authority to conduct expensive and profitable operations beyond the limits of the state by which it was created; and under governments by which its corporate existence has not been recognized, it is believed, is a matter of no very extraordinary or rare occurrence. *The East India Company*, and *The South Sea Company of England*, (t) and *The Temascaltepec Mining Company of Baltimore*, *The Tlalcotal Mining Company of Baltimore*, and some others here, are corporations having such powers. (u) If an individual has a well founded claim, arising from, or is likely to suffer by the foreign operations of such a corporation, and the case be of an equitable character, this court may take cognizance of it, and grant relief, if the body politic or its property are to be found within reach of its process. (v) And so too a corporation which has been created by a foreign government, is a legal entity of which the courts of this republic will take notice, and allow to sue, and maintain its rights here; and have funds here applied to its use out of the limits of the state. (w)

But a corporation cannot, on the ground of its foreign origin, or on the ground of its being an artificial creature of a different state from that of which the opposite party is a citizen, be allowed to sue or be sued in the federal courts; because the jurisdiction given to those courts, founded on the character of the litigants, is put upon the foot of their being *natural* persons, integral members of society, who are *citizens* of different states. Corporations, therefore, cannot be qualified to sue in those courts upon that ground, otherwise than by looking, according to a most latitudinous construction of the federal constitution, to the natural character and citizenship of all the individuals of which the artificial body is composed. (x)

(t) *The Company of Merchant Adventurers v. Rebow*, 3 Mod. 126: *Jacob's Law Dict. V. Turkey Company*.—(u) 1826, ch. 81; 1827, ch. 174; 1828, ch. 57 & 132; 1829, ch. 42.—(v) *Nabob of the Carnatic v. East India Company*, 1 Ves. Jun. 371; S. C. 2 Ves. Jun. 56.—(w) *Henriques v. Dutch West India Company*, 2 L'Raym. 1532; *Attorney-General v. The Mayor of London*, 3 Bro. C. C. 171; S. C. 1 Ves. Jun. 244; *Barclay v. Russell*, 3 Ves. 424; *The National Bank of St. Charles v. De Bernalis*, 11 Com. Law Rep. 475; *The Society, &c. v. New Haven*, 8 Wheat. 482; *Agnew v. The Bank of Gettysburg*, 2 H. & G. 479.—(x) *Hepburn*

Nor is there any provision in the Constitution of the Union which confers jurisdiction upon the federal courts in any case where a body politic is a party; because of its having been concurrently incorporated by two or more states. *The Chesapeake and Ohio Canal Company* has been incorporated by the governments of the District of Columbia, and those of the states of Virginia, Pennsylvania, and Maryland; and now holds, or may hold, much immovable property, which must be subject to the exclusive jurisdiction of each of them.

It necessarily follows, that this body politic, must, for the purposes of justice, be treated as a separate corporation by the courts of justice of each government, from which it has derived its being; that is, as a domestic legal entity to the extent of the government, under which the court acts, and as a foreign corporation so far as regards the other sources of its existence; that although the direct and strict merits of its title to the immovable property it holds, under the other governments of its origin, cannot be determined in any of the courts of this republic; yet, that the body politic itself may, because of its being found here, be restrained from wasting its funds, or expending them for any other than corporate purposes any where, in violation of the delegated authority with which it has been clothed; that, so far as regards the title to its immovable property, where it becomes necessary to restrain the making of any excavation, or erection upon it, or to obtain redress for any injury done to it, the courts of justice under whose jurisdiction it lies must have exclusive cognizance of the matter; and that, in all other cases, they must have concurrent jurisdiction. (*y*)

The dam, the erection of which is complained of, is to be extended entirely across the river Potomac; and therefore, one part of it must rest upon the territory of Maryland and the other upon that of Virginia; consequently, to that extent each state must have an exclusive jurisdiction, so far as it may be necessary to prevent its erection by injunction. But the object of preventing the erection of this dam is to put a stop to the expenditure of the funds of the body politic, for other than corporate purposes, within the District of Columbia; and consequently, so far only as the body politic

& *Dundas v. Ellzey*, 2 Cran. 445; *Bank U. S. Deveaux*, 5 Cran. 90; *The Corporation of New Orleans v. Winter*, 1 Wheat. 91; *U. S. Bank v. Planters' Bank*, 9 Wheat. 911; ante 109, note (*q*).

(*y*) *Drybutter v. Bartholomew*, 2 P. Will. 128, note.

may be restrained, by injunction, from making such illegal expenditures any where, the courts of justice of each government must be allowed to have equal and concurrent jurisdiction. Under the articles of union between England and Scotland, it is admitted, that there may be cases in which it would be difficult or impossible to do justice, unless the courts of the several states gave aid to each other; and so co-operated within their respective jurisdictions, from which all other judicial power is excluded, as to render the judgments of the tribunals of each state effectual within their proper spheres. (a) So in this country, under the limited nature of our federal union, it is perfectly obvious, that, in cases of this kind, without a proper degree of comity and mutual aid, evils may arise from the conflicting adjudications of the separate, co-ordinate and independent courts, which must be allowed to take cognizance of such matters; because of there being no common tribunal, in the last resort, by which their different determinations may be harmonized. Yet, such an exercise of jurisdiction, with all its probable evils, must of necessity be allowed, since there would, otherwise, be a total failure of justice. (b) For these reasons, the defendant's objection to the jurisdiction of this court, as relates to its power to inquire into the propriety of expenditures within the District of Columbia, may be entirely put aside.

Supposing that they might fail of making good their two first grounds of defence, these defendants have presented a third, upon which they mainly rely. They insist, that they are fully authorized to extend their works, as projected, within the District of Columbia; that, this dam, being necessary and proper for that legitimate purpose, may well be erected under that authority; and that they ought not to be judicially prevented from erecting it accordingly.

The parties, in relation to this point, ranging far a field in verbal criticism, and taking it for granted, that the act of incorporation was so excessively ambiguous, as to require all manner of assistance to reach its meaning, have carefully gathered up almost all the sayings and doings of the originators, advocates, and meddlers in what they have called, 'the great enterprise,' and adduced them to shew what is, what was intended to be, and what this court should pronounce to be the true intent, and meaning of this act of incorpo-

(a) *Kennedy v. Cassillis*, 2 Swan. 322.—(b) *The Charitable Corporation v. Sutton*, 2 Atk. 406; S. C. 9, Mod. 356; *Barnesly v. Powel*, 1 Ves. 287; *Coysgarne v. Jones*, Amb. 613.

ration, as to the terminations of the great line of canal navigation, which it was the design of this law to cause to be constructed. The court cannot think, that this act of incorporation is so very obscure as it has been said to be, in relation to the terminations of the projected canal. But, allowing it to be so, to a considerable degree, it will be fit and proper, after so much argument has been bestowed upon the subject, to say something as to the extent and nature of the external help, that may be called in upon this occasion.

No verbal proof can be admitted to explain a written contract, much less should it be allowed to introduce such testimony to shew what was the true meaning of an act of the legislature. If the language used be absolutely contradictory and absurd, the law cannot be carried into execution, and the design of the legislature, however well known it may be from inference or other circumstances, not having been expressed, must altogether fail. (c) A latent ambiguity is one which is not apparent upon the instrument itself; but becomes so by applying it to the subject to which it relates; as, if it disposes of a tract of land by name, and the maker of the instrument has two tracts of the same name; in such case proof is allowed to shew which of the two was meant. But this act of incorporation is not charged with being ambiguous in this sense; nor is it alleged, that its otherwise clear phraseology has been in any manner thrown into doubt and confusion by any exhibition of the facts, circumstances, and things to which it relates; on the contrary, those great objects, the rivers, and the mountains of which it speaks, now as when it was passed, had their existence in nature on the surface of the country, unchanged and unchangeable; and therefore, a latent ambiguity, in any legal sense of that expression, cannot be shewn to exist by any proof whatever.

The act provides for the making of a 'navigable canal from the tide-water of the river Potomac.' And the question arising out of this expression is, as to where the canal shall begin. Hence it is obvious, that the proof of facts and circumstances of any kind, as evidence of what was really intended to be the point of beginning thus described, can only be allowed on the ground, that it is admissible thus to assist in the interpretation of expressions which are doubtful upon their face, and so to aid the court in making out the sense of the legislature by other means than the language used,

when taken in connexion with the known and established nature of the subject of which that language treats.

Private acts of assembly are, in a great variety of cases, and in many respects, regarded as mere contracts, binding alone on those who apply for and are parties to them. As to such acts, and ancient charters, there are some kinds of doubts and obscurities which may be removed and dispelled by extrinsic evidence. Where however the terms of such an enactment are not in themselves doubtful, no such evidence can be introduced, since that would be not to obviate but to create doubts. (*d*) In regard to such private acts the petition of the applicant, and the votes and proceedings of the two houses of the General Assembly may, perhaps, be received as evidence affecting the rights of the parties, and guiding the construction of such private legislative enactments. (*e*) But in all

(*d*) *Attorney-General v. Parker*, 3 Atk. 576; *Rex v. Varlo*, Cowp. 248; *Withnell v. Gratham*, 6 T. R. 388; 5 Cruise Dig. tit. 33.

(*e*) O'NEALE'S CASE.—On the 20th day of December, 1794, the following resolution was propounded in the House of Delegates respecting Lawrence O'Neale, then a delegate from Montgomery county.

Whereas, John Hamilton, of Prince George's county, did petition this General Assembly for an act to authorise the issuing of a patent on a survey made for him of a tract of land, in Prince George's county, called Hamilton's Purchase, containing two hundred and forty-eight and a half acres of land, stating that the record of the original patent thereof had been lost; and whereas, by a certificate exhibited with the said petition, signed by the register of the land office, it appeared by an entry made in the margin of the record of the warrant on which the said survey was made, that a patent had issued; but that there was no record of the patent or certificate remaining in the land office; and whereas, Lawrence O'Neale, Esquire, a member of this house, after the exhibition of the said petition, and the reading and reference thereof to a committee for consideration, did make application to the register of the land office for a warrant of proclamation to affect the land included in the said survey; and this General Assembly being of opinion, that such conduct is a violation of the rights of the people of this state, and the duty of a representative,

Resolved, That the said Lawrence O'Neale be expelled, and he is hereby expelled from this house; and his seat as a delegate for Montgomery county declared to be, and it is hereby vacated.

Ordered, That the said resolution have a second reading to-morrow, that the said Lawrence O'Neale be furnished with a copy thereof, and that he have permission to be heard by counsel at the bar of the house; and that summonses issue for John Callahan and Henry Whitcraft, to appear at the bar of the house on to-morrow.

On the next day the house took into consideration the resolution respecting Lawrence O'Neale, agreeably to the order of the day; and, after hearing Mr. Pinckney at the bar of the house in behalf of the said Lawrence O'Neale, the question was put, that the house assent to the said resolution.—Yeas 29, nays 34. So it was determined in the negative.

On motion, the question was put, That this house do highly disapprove of the conduct of Lawrence O'Neale, Esquire, as a member of this house, in entering an

other cases where the language of a legislative enactment is clear, explicit, and unambiguous, a court of justice cannot depart from its sense as expressed; and if its directions cannot be executed in the manner prescribed, whether the defect proceed from a mistake, or the negligent inattention of the legislature, no court of justice can supply the deficiency. (*f*) It has been said, that, in England, the judges have often demanded what the law was, and how a statute should be expounded, of the lords in parliament. (*g*) It is evident, however, that in those cases the court has had its doubts removed and the ambiguity cleared away, not by any extrinsic evidence; but by the legislators themselves, responding either as a legislative body, or as the supreme court in the last resort. In the celebrated case concerning literary property, a question arose as to what was the common law before the passage of the statute for securing a copy-right to authors; (*h*) and in casting about in every direction to ascertain that, it was argued, by several of the judges, that the statute itself, as well as the proceedings of the parliament by which it was enacted, afforded proof of what was generally understood, at that time, to be the common law upon the subject. (*i*)

But every species of evidence may be introduced to show what the common law is now, or has been at any time past; because that part of our code is made up of reasonable principles and established usages, the existence of which, in the absence of express adjudications and records, can only be shewn in that way. (*j*) And, therefore, for that purpose, the judges had recourse to the history of that act, they adverted to the petition on which it was introduced into the house of commons, as found on the journals of

application at the land office for a proclamation warrant to affect the land of John Hamilton, after a disclosure of the facts existing in the said case by the petition of the said John Hamilton preferred to this house—Yeas 61, nays 2. So it was resolved in the affirmative.

Immediately after which an act was passed, reciting that, whereas, it may happen that facts may be disclosed by petitions preferred to the General Assembly, of which advantage may be taken, to the injury of the party petitioning; therefore it was enacted, that whenever a petition shall be presented to the legislature by any person to confirm his title, the claim of such person shall not be invalidated by any thing contained therein, until the end of the session; provided that nothing therein contained should prevent or delay a suit or execution. 1794, ch. 45.

(*f*) *Weale v. West Middlesex Water-Works Company*, 1 Jac. & Walk. 371.—(*g*) *Arth. Blackamore's case*, 8 Co. 314; *The Earl of Shaftesbury's case*, 1 Mod. 153. (*h*) 8 Anne. c. 19.—(*i*) *Millar v. Taylor*, 4 Burr. 2305.—(*j*) *The King v. Pasmore*, 3 T. R. 245; 1 Blac. Com. 68.

that house ; to the debates upon it and to the amendments it had undergone ; and to the language of the act itself, as evidence of what was the then existing common law. But it is not said, nor can it be inferred from their arguments, that the judges deemed it allowable to introduce all such matter as evidence, by which the true sense of that act itself was to be ascertained, in relation to any case for which it had provided ; on the contrary, one of the judges, speaking to this point, after noticing, that it had been strongly contended by one of the counsel, that from the amendments in the committee of the house of commons, and from the change of the title, that the Parliament meant to take away, or to declare there was no property at the common law, says, 'that the sense and meaning of an act of Parliament must be collected from what it says when passed into a law, and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house, or to the sovereign.' (k) From which it clearly appears to have been his understanding, that it was improper to admit even the proceedings of either one of the branches of the legislature itself, as evidence of the true construction of a statute. And upon a more recent occasion, when the construction of a statute was drawn in question, the court looked into the proceedings of parliament in relation to the act, but declaring that it laid no stress upon them, grounded its decision upon previously adjudged cases. (l)

The act, under which *The Chesapeake and Ohio Canal Company* has become a body politic, originated with the legislature of Virginia, has been adopted and re-enacted by three other distinct legislative bodies, each one of which, composed of two or more branches, is entirely independent of all the others. These legislative bodies have thus manifested their concurrence and satisfaction in the sense expressed by the language of this law, when taken by itself, and without any other help than what may be derived from the nature of the subject of what it speaks. Surely then, if it would be at all unsafe to collect the sense of a law from the history of the changes it underwent in one branch of a legislative body ; because, that history might not be known to the other ; or because, the other might have had a different understanding of the matter, or been influenced by motives peculiar to itself, it would be wholly unjust, and improper to collect the sense of this act of incorpora-

(k) *Millar v. Taylor*, 4 Burr. 23 32.—(l) *Mackintosh v. Townsend*, 16 Ves, 337.

tion from the proceedings, or debates of any one of the four independent legislative bodies, by whom it has been adopted. And, if the grave and solemn movements of the several legislative bodies themselves, by whom it was passed, cannot be considered as altogether safe guides in ascertaining its meaning, most assuredly the resolutions of the various assemblages of people, who have met at sundry times to consult about 'this great enterprise,' with all the unofficial sayings and doings in relation to it, which have been so much pressed upon the attention of the court, must be utterly rejected, as absolutely unworthy of any the slightest respect or attention whatever.

It would be of dangerous consequence to admit parol proof of an intention in the law makers, different from that manifested by the words of the law itself; as to shew, that a duty which the act of Assembly called a *port duty*, was intended to be a *fort duty*. (m) In construing a legislative enactment, a court of justice cannot regard the resolutions, orders, or propositions entered upon the journals of either branch of the legislative department; but must look to the statute book alone, the words of which must speak for themselves; nor can it consider the motives which may have influenced the legislature any further than they are manifested by the language of the statute itself. A judge must form his judgment of the meaning of the legislature as if the case had been brought before him by demurrer, in the consideration and determination of which no evidence can be admitted; yet, in all such cases he may well inform himself from dictionaries or books which treat on the particular subject; in doing so, however, such authorities are not to be regarded as mere evidence, but only as the grounds of his judgment, as if he were to cite authorities illustrative of the opinion he delivers. (n)

The provisions of the act incorporating *The Chesapeake and Ohio Canal Company*, upon the true construction of which the present question turns, relate only to the termination of a great work which that corporation is to cause to be executed; and the matter to be decided is, where that termination was intended to be; or whether that body politic has been restricted to any given space or

(m) By the king in Council on rejecting Lord Baltimore's claim of certain Port Duties; Bacon's Law of Maryland, 1692, ch. 17, note.—(n) *The King v. Waddington*, 1 East 148, 158; *The Attorney-General v. The Cast Plate Glass Company*, 1 Anstr. 39; *Cameron v. Cameron*, 7 Cond. Chan. Rep. 374; *The people v. Utica Insurance Company*, 15 Johns. Rep. 380, 394.

place within, or at which their work must terminate. The great, the sole purpose of this act is to cause a navigable canal to be made 'from the tide of the river Potomac, in the District of Columbia,' over to the river Ohio; and this act of incorporation must be construed with reference to that great object, so far as regards the matter now under consideration. (*o*)

The termination, now in controversy, is no otherwise described than by the expression, 'from the tide of the river Potomac, in the District of Columbia' The tide, thus designated, is a large space; and the surveys, which have been exhibited in this case, demonstrate, that it is perfectly practicable to extend this canal along, and to terminate it at any one point of the whole of this space of tide. The canal may be stopped precisely at the head of tide; but this, it is admitted, would not be altogether correct, or certainly not for the best. It is said, that it should descend to, and be terminated at good practicable tide navigation. Again, it is clear, that the canal may be conducted up the valley of Rock creek, and, so round Washington, to the Eastern branch, and enter the tide near Bladensburg; or thence, descending along the left bank of that river, it may unite with the tide opposite or below Washington. This, however, it is pronounced with one voice, and at once, would be absurd. I admit it to be so. But it is nevertheless, a very illustrative absurdity. It clearly shews, that the phrase here used is neither to be taken literally, nor wholly without limit; but must, of necessity, be controlled by the nature of the subject spoken of. A termination exactly at the first tide to be met with among the rocks at the foot of the falls; or in the shallow tide near Bladensburg, it is confessed by all, would be injurious; and an union, by a great circuit, with the bold, deep tide which washes the left margin of the Eastern branch, or the Potomac river, it is declared would be absurd.

There is, therefore, a large range of the tide at which this canal might be terminated, that must be rejected. The tide spoken of, it is evident, is circumscribed to a given place, a pool to which the canal ought to come, and beyond which it ought not to be allowed to go. Rejecting then, all that space of the tide of the District of Columbia, within which it would be confessedly inconvenient or absurd to fix upon as a termination for it, it will be necessary to

(*o*) 1 Blac. Com. 61; New River Company v. Graves, 2 Vern. 431; Curling v. Chalklen, 3 M. & S. 510.

look into the nature of the subject itself to ascertain whether there are any principles of canalling which may, at this day, be considered as the settled common law in regard to the termination of canals of this description, that indicate the point at which this canal must be terminated.

For this purpose it will be necessary to understand what it is that constitutes a port; to notice what is called improved river navigation, in contrast with proper canal navigation; and to shew where and how, by a kind of common consent, all canals of this description have been terminated. The circumstances which will be mentioned in relation to these matters, are such as are of universal notoriety; and as are always recurred to as furnishing an illustration of the causes which have always brought marine as well as canal navigation to a termination at particular places; so that the nature of the subject treated of in this law, and the principles by which it should be construed may be fully understood. Recollecting as we proceed, that all doubtful points are decided by an application of general principles to the particular case. (*p*)

According to one of the most venerable of our legal authorities, a port is a place for arriving and unlading of ships and vessels. It has a city or town, called the head of the port, for receipt of mariners and merchants, and the securing and vending their goods, and victualling their ships. So that to constitute a port, it must be a place to which vessels may have easy access from sea, and where they may lie in safety; and there should be houses and suitable accommodations for mariners and merchandize as well as a harbour for ships. But it sometimes happens, that the town, or the head of the port, as it is called, is at some distance from the port itself. This however, is always attended with great inconvenience; and, therefore, in many instances, where it was practicable, the navigation has been extended at an enormous expense to the town or head of the port. (*q*) Anciently, the natural navigation of the river Ex, in England, was such, that large ships went quite up to the city of Exeter; but a malicious earl of Devon, by throwing dams across the river, entirely choked the channel, so that ships were obliged to stop four miles below, which place was, for a long time, considered as the port. But at great expense the obstructions were removed, and now ships again find

(*p*) *Silk v. Prime*, 1 Bro. C. C. 133. n.—(*q*) *Hale de Port-Marais*, 46.

a port at the walls of the city. (r) The city of Chester, in England, is situated on the river Dee, the crooked channel of which had become so choked up, by washings from the land, that ships were obliged to make a port eight miles below. But some time since, a new channel was cut for the river near the old one, and at a vast expense, and ships now again go up to the port at the city. (s)

The Severn, among the rivers of England, has, of old, been denounced as 'a most wild unruly river;' its descending floods have, at various times, swept along with such violence, and carried with them such masses of earth as entirely to fill up the former, and excavate an altogether new channel in many spaces; and such is the rage and impetuosity of the tide, whether of flood or ebb, that no vessel ventures up it farther than King Road, near its confluence with the Avon, without a pilot. (t) The chief ports on this river and its branches are Bristol and Gloucester, up to each of which the tide flows; but to overcome the dangers and difficulties of the natural access to them has called forth the most powerful efforts of human ingenuity, and the expenditure of immense sums of money. About seventy acres of the old and crooked course of the Avon was to be converted into a vast dock at Bristol, into which ships were to be lifted by locks; and into which also the boats of the Kennet and Avon canal were to be admitted. And a canal has been constructed for the passage of ships, seventy feet wide and eighteen feet deep, from Berkley to Gloucester, a distance of eighteen miles along the valley of the river. (u)

These and a number of other examples, that might be given, may be regarded as extensions of tide navigation, so as to have a port immediately at the city which is the seat of the commerce. The dangers, difficulties, and delays of the natural tide navigation, in some cases, and the expense and delay of transshipments and of land transportation, in others, however short, were so very great as to demonstrate the necessity and utility of having the port and the town, or head of the port, immediately together. The termination of marine navigation, in relation to the matter now under consideration, therefore, is not, in any case, the most interior tide on which a ship may safely float; but it is uniformly the port at which, owing to a variety of concurring circumstances, artificial

(r) Malham's Naval Gaz. v. Exeter.—(s) Rees' Cyclo. art. Canal.—(t) Hale *de Jure Maris*, 16, 34.—(u) Rees' Cyclo. art. Canal.

and natural, she must stop; because the object of her voyage must there end.

There is a material difference between legislative enactments relative to the formation of an improved river navigation, and those in relation to proper navigable canals; because of the material difference between the two subjects. The forms and modes of the two kinds of navigation, are essentially different; and therefore, inferences and principles, fairly deducible from, or applicable to one, cannot, with any propriety, be made from, or to the other.

The river Thames, in England, is navigable above London, for a considerable distance; and the vessels, which pass up it, are all provided with a self-moving power; many of them have a horse on board, to be sent out for towing when it can be done. Sails are used, where an opportunity offers, and where not, they use oars, or setting-polls. For some spaces they have the privilege of a towing path on the bank, from which the horse is made to tow the boat; and in other spaces the horse is driven into the river, to wade along, and drag the boat after him. On the river Severn, in England, a towing path, from which vessels are drawn along up or down the river, is claimed by custom and has been confirmed by statute. (v) In some spaces of river navigation, the vessel is lifted up, or let down into short canals, and thus passed by innavigable rapids; in others, its safe passage is secured by means of dams, sluices, or cuts. The whole course of river navigation is irregular in its modes of movement; but the vessel proceeds throughout by having with it, from the very port, whence it sets forth, a moving power suited to each mode of navigation, either of which may be used according as it may be most beneficial; and that too, through a wide, deep, and occasionally a rapidly descending stream. The act incorporating *The Potomac Company*, furnishes a complete example of river navigation. By that act the rapid headlong river Potomac, above tide, was to be made navigable; its falls were to be surmounted by locks and canals; its ripples were to be opened by cuts; and its shallows were to be cleared so that boats might pass up or down with safety.

Proper canal navigation is uniform in its movements and limited to one kind of propelling power; that is, by means of a towing path; and it is rarely, or ever permitted to use any other. The

(v) *Hale de Port. Maris*, 86, 23 Hen. 8, c. 12.

vessel itself is built and laden just so as to float upon still water, unagitated, and without a ripple or wave. All which gives to this form of transportation a peculiarity of character, which renders it necessary, that the canal, for which it is alone and exclusively adapted, should terminate at that point where it meets the marine navigation; since the merchandise cannot, as in the case of river navigation, reach the port, unless the canal be extended to that point, otherwise than by transshipment into other vessels, or by land transportation.

Hence it is obvious, that a boat, properly prepared for river navigation, would not only be fitted to encounter the tide navigation from the port to the very foot of the falls, but that portion of her voyage would be, in all respects, the safest and easiest. And, therefore, it was, that the act incorporating *The Potomac Company*, the purpose of which was to open a river navigation, specified, that improvements should commence 'above tide water.' But to a proper canal boat the tide water portion of her voyage would be the most perilous, or require a preparation and out-fit entirely useless through all the rest of her passage. There is, therefore, no just foundation for the position assumed in the argument, that the same termination on tide would be alike well adapted to these two different modes of navigation.

There are many canals which facilitate marine navigation, or in an indirect manner contribute largely to the gathering together commodities for foreign commerce, which are, however, in their general character, and in the objects of their terminations very unlike the one under consideration. Of the canals of this description are those which have been constructed as thoroughfares, for sea vessels, from one sea or bay to another, across a long narrow peninsula. Such as the canal of Kiel, in Denmark; (*w*) the Caledonian canal, the Forth and Clyde canals of Scotland; and the Chesapeake and Delaware canal of our own country. There are, in England, several canals, which have been constructed solely for the purpose of transporting sand, sea-weed, and shells, 'for bettering of their lands,' from the sea shore into the interior; (*x*) the terminations of which have no concern with marine navigation. In the island of Great Britain there are, besides a great number of canals, from coal mines and quarries to towns; and from one city to another. These and all such lines of canals, furnish no imme-

(*w*) *Oddy's Commerce*, b. 5, c. 3.—(*x*) *Hale de Jure Maris* 26, 7 Jac. 1, c. 18.

diat illustration of the point under consideration, further than, as the numerous instances in which they have been continued by tunnels through high ridges, where water could be had to supply the summit level, shews, that it has been universally, and every where found necessary to continue the canal line of transportation unbroken and without the least interval, where it was at all practicable to do so, even at the greatest expense.

The great object of *The Chesapeake and Ohio Canal* is to facilitate the transportation of the productions of the interior of our country to the 'tide-water of the river Potomac in the District of Columbia;' and, consequently, those canals only, of other countries, and places, which have a similar object in descending from the interior to the tide, can afford any correct illustration as to the point of termination, on tide, which should be given to this canal. In selecting the instances, for this purpose, I shall confine myself to those of Great Britain, and of this country, as being best known, and amply sufficient for all the purposes to which I deem it proper to pray in aid such examples.

The object of the Aberdeen canal, which is nineteen miles in length, was the exportation of granite stone, from the famous quarries on the banks of the river Don; and for that purpose the canal has been made to terminate in the port of Aberdeen. The Glenkin canal was intended to facilitate the exportation of coal, lime, iron ore and other minerals; and it terminates in the tide-way of the port of Kirkcudbright. The Glamorganshire canal is twenty-five miles long; and its objects are the exportation of the produce of the immense iron, coal, and lime works in the interior. It terminates in the river Severn near Cardiff, where there is a floating dock sixteen feet deep, in which a great number of ships of three hundred tons burthen can be constantly afloat, and load or unload, either at the spacious warehouses on its banks, or from or to the boats belonging to the canal. The Swansea canal, having a similar object, has a similarly advantageous termination and meeting with the marine navigation.

The Stroudwater canal, and the Thames and Severn canals leading through various others over the interior and across England, are connected with the ship canal leading into the port of Gloucester. The Kennet and Avon canal, which is stretched across England to London, terminates in the great ship basin at Bristol. The Chester canal proceeds from the very port to form connexions with the canals of the interior. The Mercy and Irwill navigation,

as it is called, has for its appendage the famous Wet Docks of Liverpool. This navigation is formed by inclosing and straightening a portion of the river itself for a considerable distance above Liverpool, like a proper canal, and is a still water navigation. The Bridgewater and several other of the principal canals, from the interior, are connected with this canal. The Leeds and Liverpool canal passes several of the principal manufacturing towns, and with others crosses England entirely in several directions. This canal terminates at Liverpool, and the canal boats deliver their cargoes of coal there, on a steep hill-side, so that it slides down into a yard on the water side of the harbour. (*y*)

The Lancaster canal is seventy-five miles in length, and the greater portion of its northern part skirts along near the sea-coast. Its objects are the interchange of the lime-stone of the northern parts for the coal of the southern, the supply of Lancaster, Preston, &c.; and yet those ports are accessible from the sea. This canal has an opening to the sea by a short cut near Lancaster. The Edinburg and Glasgow canal passes entirely across Scotland. This canal begins at Lieth in the port of Edinburg and ends in the tide-way of the Clyde in the town of Glasgow. It is also connected, by means of the Markland canal, with the Forth and Clyde canal, which has a convenient port at each of its terminations; and it is besides connected with the Saltcoats canal which terminates on the sea-coast to the south of the Clyde, where a secure basin has been constructed for the reception of ships and canal boats. At the port of Armin, on the tide of the river Ouse, a branch of the Humber, the Ayre and Calder navigation terminates; where the canal boats from Liverpool, or the interior meet sea vessels of one hundred and fifty tons burthen. The tide flows in the river Thames to Richmond, a distance of sixteen miles above London, and affords perfectly safe navigation for small vessels; yet the Grand Junction canal, which is connected with the principal canals of the interior, passes down near this tide navigation, and terminates at Paddington, immediately contiguous to London, where, for its connexion with the river it pays an annual tribute to the city. Had it been practicable to obtain, by any reasonable means, an adequate supply of water, this Grand Junction canal would have been extended through the city itself into the London docks at Wapping. (*z*)

From this review of the canals of Great Britain it appears, that

all of them, which have been, in any manner, intended to contribute to the marine commerce of the nation, have not merely been carried to and immediately connected with the very first safe tide-navigation to be found; but have been conducted down into the very ports themselves. The ports of a nation are its great gates; and therefore all canals have gone there to meet, assist in, or contribute to the commerce of the country. And in order, that this may be effected to the greatest advantage to all, it is essentially necessary, whatever may be the cost, as well, that the sea vessel should be enabled to have access to and make a port at the city or great commercial depot itself; without any break in the continuity of her voyage, as that the canal vessel should also be enabled, without any interruption in her course, to meet the sea vessel in the same port or pool, and interchange cargoes with her.

The propriety of extending a canal along parallel with, and near to tide water navigation has often been a matter of doubt, and, in some instances, it has been made a subject of ridicule. The Southampton and Salisbury canal of England, passes for some miles along the bold deep tide of the Southampton water, into the very port of Southampton itself. From its skirting along close to the shore of that river it was, that that facetious satirist Peter Pindar took occasion to burlesque 'Southampton's wise sons.' But notwithstanding doubt and ridicule, the propriety and necessity of conducting canals of this description into the very port itself, has, in Great Britain, been practically demonstrated in the most satisfactory and conclusive manner; and become established as the settled common law of canalling.

But it may be said, that although, in Great Britain, it may be considered by all as essentially necessary, that the canal and marine navigation should be conjoined in the port itself; yet unless it shall appear, that such has been also considered in this country, as the principle upon which such a canal should be terminated, there can be no presumption, that the legislators who passed this act of incorporation so understood the matter; or spoke of a canal the termination of which must be in a port. To shew what was the universal understanding in this country, in relation to this matter, a few instances will be sufficient.

The great Erie canal of New York, in descending easterly, after receiving the Champlain canal, passes close along side of the tide of the North river, in which there is good sloop navigation, for a distance of seven miles, to Albany, where it terminates in a basin,

from which the canal boat may hand over her cargo immediately into a sea-vessel. In extending over to the west, it passes through a large artificial harbour, constructed at Black Rock, into which the canal boats, and the lake vessels may both enter and interchange cargoes, and then terminates at the port of Buffalo on lake Erie. The Massachusetts canal, instead of stopping at the head of tide, where the navigation is good, is carried close alongside of it, four miles further, into the harbour of Boston. The boats navigating the river Santee could only reach their great market, by passing out of it, and some distance along the sea coast. To save them from this exposure and risk, a canal was constructed from the Santee into Cooper river, so as to bring them directly into the harbour of Charleston. And speaking of the river navigation of the upper Potomac, of which the lower piece of canal constitutes a part, and was only intended to enable boats to surmount the first impassable falls, it has been said, 'that the legislative impartiality, which has required the canal to enter the river, at the very head of tide, in order that Virginia may have an equal chance of becoming the depot of its commerce with Maryland, has very much injured its utility to the country at large.' (a) From these examples it satisfactorily appears, that here, as in Great Britain, it has been universally understood, that canals, intended to co-operate with marine navigation, must be terminated in the very port itself, where the marine navigation, in like manner ends.

The specified and known objects of a canal give to it that which may be called its peculiar character, and shew to what class it belongs. All canals of that class which are intended to facilitate the transportation of the productions of the interior to tide for exportation; and of the importation of foreign commodities by the same route, must terminate at the port or point where alone the two forms of transportation can conveniently meet. *The Chesapeake and Ohio Canal* is intended to be one of this character; and therefore, it must have such a termination, unless it be otherwise expressly provided by law.

This canal is described in the preamble of the act of incorporation, and in its twentieth section, which recognizes and affirms that given in the preamble. In these provisions we have the objects of the great work distinctly specified. They were to establish a

(a) Per Latrobe, Report of A. Gallatin, Secretary of the Treasury on Roads and Canals, 1808, page 87.

connected navigation between the eastern and western waters, so as to extend and multiply the means and facilities of internal commerce, which would produce the happy results set forth. And the route which it was to take, up the valley of the Potomac, and thence over to the Ohio, is specified by the declaration, that it is 'to be fed through its course, on the east side of the mountain, by the river Potomac, and the streams which may empty therein; and on the western side of the mountain, and passing over the same, by all such streams of water as may be beneficially drawn thereto by feeders, dams, or any other practicable mode.' The terminations are described by a reference to the great object expressed, of 'a connected navigation between the eastern and western waters.' Our eastern tide waters are navigated by ships and marine vessels to the ports, or highest point of convenient tide navigation; and our western waters are navigated to great advantage, and chiefly by steam-boats. These two forms of navigation, it is proposed to connect together by one unbroken line of canal; and the terminations of this new artificial connecting line of navigation are specified accordingly, with a distinct reference to the pre-existing modes of navigation. 'A navigable canal from the tide water of the river Potomac in the District of Columbia,' passing along the route indicated, 'to the highest steam-boat navigation of the Ohio river, or of some one tributary stream thereof.' (b)

Here we find the western termination specified by designating the kind of vessel which the canal boat must be enabled to meet there; she must have it in her power to lay along side of a steam-boat in the waters of the west; and thus the connexion with those waters was to be formed. Hence it is manifest, that the connexion with the eastern waters was to be formed in like manner; that is, that the canal boat should be enabled to meet a ship, by which kind of vessels alone the tide waters of the east are navigated. The new line of navigation would then, indeed, form a full and complete connexion 'between the eastern and western waters;' which could be so effected in no other way. The naming of the steam-boat clearly shews, that it was the intention of the legislators, by this law, to provide a mode of transportation from the one to the other of those two classes of vessels, which were then so profitably navigating the great rivers of our country. They intended, that the canal boat should be enabled to pass

over the whole space, from the ship of the east to the steam-boat of the west. It is not said, that the western termination shall be at the highest point to which a steam-boat may go, but, 'to the highest steam-boat navigation;' that is, to the highest point at which such vessels usually go, and where they make their port. And so, as to the eastern termination, the canal boat is to meet a ship; but that kind of vessel is hardly ever found at the highest point of tide, to which she may go, but at the highest port. And therefore the canal must necessarily be extended down to the port; since the ship can meet and have intercourse with the canal boat no where else.

It is universally understood, that all canals, which have for their chief object the exportation of ponderous and cheap commodities, in co-operation with marine navigation, must be extended into the very port itself. But, in this instance, more is expected; and therefore, there is, if possible, an increased necessity for extending this canal into the very port. The greatest and most important political results, it is declared, are expected to flow from connecting, in this way, the navigation of the east with that of the west; and hence, it must have been intended, that the connexion should be made in the most complete and perfect form; that there should, if possible, be not the least break or interruption in any part of the whole line from the ship of the east to the steam-boat of the west. Five miles of land transportation would cripple the intercourse most prodigiously; thirty miles of land portage would destroy the line of connexion totally.

Taken in this point of view, this law, by calling for a beginning of this canal 'from the tide water of the river Potomac, in the District of Columbia,' must be construed to have a reference to one, or to all of the three ports on that tide, at which the marine navigation ends. A different construction would confessedly allow of a termination, that might be greatly injurious, or even absurd; one which might mar the whole project, by stopping the great mass of ponderous canal borne commodities some miles short of their destination, there to be taken up and moved on again in another form. But it is manifest, from the nature of the subject provided for by this law, that the chief port of the District of Columbia must have been contemplated as the most suitable eastern termination of this canal. Whence this court is perfectly satisfied, that this company not only have a right, but that it is their duty to extend this canal into the port of Washington, as being the most

central, and the chief port or pool of that space of tide in the District of Columbia, specified by their act of incorporation, as the point of its eastern termination. And consequently, that all expenditures of the corporate funds, in order to carry it down into the port of the city of Washington, at Rock creek, or elsewhere within that port, are legitimate, and cannot be prohibited by injunction.

Upon the whole, I feel perfectly well satisfied, from the facts and circumstances disclosed by these pleadings and exhibits, supposing them to have been presented as between proper parties and in the most correct form, that there is no ground whatever for granting, renewing, or continuing any injunction against *The Chesapeake and Ohio Canal Company*.

Whereupon it is *Ordered*, that the injunction heretofore granted in this case be and the same is hereby annulled and dissolved. And it is further *Ordered*, that the attachment heretofore awarded in this case be and the same is hereby quashed with costs.

It appears from an inspection of the docket entries as late as the 1st of January, 1839, that after this order no further proceedings had, up to that time, been had in this case.

WINDER v. DIFFENDERFFER.

Where trustees under a will, not having authority to sell, refuse to act, on a bill, making such trustees and the *cestui que trusts* parties, another trustee may be appointed.—The trustee, having the profits of the estate in his hands, ordered to pay the auditor's fees.—A decree for a partition among devisees, the costs to be paid by each in proportion to his share; and a decree to account for the rents and profits against the trustee by whom it was held.—A part of the property, appearing by the return of the commissioners to be incapable of partition without loss, decreed to be sold.

The mode of collecting testimony and taking the depositions of witnesses in England and in Maryland, under a commission.—No objection, coming from a party, to suspend the taking of the depositions before the commissioners; but such objections may be noted and decided at the hearing.—A witness may, on assigning cause, demur to the questions propounded to him; upon which the examination must be suspended until the court decides.—If the books of a bank be shewn to contain evidence pertinent and proper, the party is entitled to have them produced, or to have extracts taken from them.—A witness may be compelled to attend and have his deposition taken before a justice of the peace.

The application of the principles of substitution as regards principal and surety.—

The principles of equity in regard to the marshalling of securities and of assets.—

The mode of computing interest; and the cases in which it is allowed.—The cases

in which compound interest may be charged.—Commissions allowed to a trustee, as a compensation for his skill and trouble, are not to be lessened, or withheld ; because of conduct in respect to which he had been charged with interest.

THIS bill was filed, on the 8th of August, 1825, by *William Sydney Winder*, and *Araminta*, his wife, against *John Diffenderffer* and his three infant children, *Amelia Diffenderffer*, *Michael Diffenderffer*, and *Charles R. Diffenderffer*. The answer of the defendant *John* invoked into this case the proceedings in a suit instituted some time before in this court, which forms a preliminary and necessary illustration of the grounds of this controversy. The proceedings in that suit are as follows :

On the 27th of February, 1806, *Sarah Rogers*, *Mary Lee*, *Catharine Rogers*, and *Nicholas Hopkins*, filed their bill against *John Merryman* and *William R. Smith*, in which they stated, that *Charles Rogers* had, on the 15th of November, 1805, made his last will disposing of his estate, in trust, for the benefit of the plaintiffs, *Sarah*, *Mary*, and *Catharine*, and soon after died. This will, so far as regards the matter in controversy, is as follows :

‘ I do hereby nominate and appoint my friends *John Merryman*, *William R. Smith*, and *Nicholas Hopkins*, and the survivors, or survivor of them, and the heirs of such survivor trustees of all my real estate, to hold the same in trust as is hereinafter mentioned, and also I do hereby make them executors of this my last will and testament.

‘ Secondly, I do give and devise to my dear wife *Sarah Rogers*, my dwelling plantation, whereon I now live, for and during her natural life ; it being my intention, that she shall occupy the same without the interference of my trustees during that period. I give and bequeath to my said dear wife, her executors, administrators, and assigns, all my household furniture, of what nature or kind soever, and all my plate ; except as hereinafter excepted ; as also her choice of three horses ; three milch cows ; all the hogs ; carriage ; a wagon ; carts ; ploughs, and other farming utensils on the place whereon I now reside ; the residue of my stock, it is my will and desire, shall be sold in order to the payment of my just debts. I also do hereby give and bequeath to my said wife all my negro slaves to be by her manumitted, when she may think prudent and advisable.

‘ Thirdly, I do further give and devise to my said friends *John Merryman*, *Nicholas Hopkins*, and *William R. Smith*, and the survivors and survivor of them, and the heirs of such survivor, all my

real estate of what nature or kind soever, and wherever lying, being and situate; and also the remainder of my said dwelling plantation, to hold the same, unto my said trustees and to the heirs of the survivor of them, in special trust to and for the uses, intents and purposes following; and to and for no other use, intent or purpose whatever; *to wit*: to have and to hold the remainder and entire estate of said dwelling plantation, after the death of my said wife, unto the sole and separate use of my daughter *Sarah Bailey*, for and during her natural life, without the interference of her present, or any future husband; it being my intention, that the rents and profits of the same be paid to her alone, for which her separate receipt is to be given, either to the tenants who may occupy the same, or to my said trustees; and, immediately after the death of my said daughter, then in trust to and for all and every the child or children of my said daughter, and the heirs and assigns of such children as tenants in common and not as joint tenants.

‘It is my will and desire, that the real estate, which I hold in the city of Baltimore, and fronting on Baltimore and Calvert streets shall be divided as follows, viz: That forty feet shall be laid off fronting on Calvert street, and contained within the following boundaries: beginning at the corner of the alley which terminates in Calvert street, and runs west to St. Paul’s Lane, and thence running and bounding on Calvert street south forty feet; thence in a straight line west, parallel with Baltimore street to the extreme extent of my line; thence north, parallel with Calvert street until it intersects the said alley; thence, binding on said alley, east to the beginning; which said piece or parcel of ground, so as above described, my said trustees are to hold to and for the sole and separate use and behoof of my said daughter *Sarah Bailey* for and during her natural life, she to receive the profits thereof; and to give receipts for the same either to the tenants or my said trustees, as above specified; and from and immediately after her decease, then said premises to be divided equally amongst all and every child or children, and the heirs and assigns of such child and children as tenants in common, and not as joint tenants. The residue of said property, fronting on Baltimore and Calvert streets, it is my will and desire shall be divided as follows, *to wit*: the same is to be divided in three equal parts, as to value, by my said trustees, or the survivor or survivors of them; and to be by them held to and for the sole and separate use and behoof of my three youngest daughters, *Ann Martin*, *Mary Lee*, and *Catharine Rogers*, for and

during their natural lives; and not subject to the control of any present or future husband of either of them; it being my intention, that the rents and profits of said property be paid to my said daughters; they giving separate receipts to their tenants or trustees; and immediately after the decease of any of my said last mentioned daughters, then my trustees are to hold her share of the said last above mentioned premises, in trust to and for all and every child or children of said daughter, and the heirs and assigns of such child or children, as tenants in common and not as joint tenants.

‘It is my will, that my trustees, or the survivor of them, draw for the separate division or share of each of my said daughters, and their children or issue, the lot of ground lying in the precincts of the city of Baltimore, and by me heretofore leased to a certain *Mr. Eden*, whereon is erected a sugar-house; my said trustees, and the survivors and survivor of them, and the heirs of such survivor, are to hold in trust to and for the sole and separate use and behoof of my daughter *Sarah Bailey*, during her natural life, she giving receipts for the profits thereof to the tenants, or trustees, without the interference of any husband which she may have, and immediately after her death, then in trust to and for all and every the child or children of the said *Sarah Bailey*, and the heirs and assigns of such child or children, as tenants in common and not as joint tenants.

‘The residue of my real estate, situate, lying and being in the city of Baltimore, Baltimore county, State of Maryland, or elsewhere, it is my will and desire, that my said trustees, and the heirs of the survivor of them, hold the same in trust to and for the sole and separate use and behoof of my said three youngest daughters, *Ann Martin*, *Mary Lee*, and *Catherine Rogers*, as tenants in common and not as joint tenants, without the control or interference of any present or future husband; each to receive the rents and profits of the same, and to give receipts either to the tenants or my trustees. And from and immediately after the decease of each of said three daughters, then in trust to and for all and every of the child and children of said daughters their heirs and assigns, as tenants in common and not as joint tenants; such child or children to have the share of its or their parents, *to wit*: the one-third part of said last mentioned premises, leaving the two-thirds to my surviving daughters; and in case of the death of two of them, then

leaving the one-third to the survivor, the remaining two-thirds vesting in the issue of my deceased daughters, *per stirpes*.

‘My poultry I give and bequeath to my dear wife. If the balance of my personal property be not adequate to the payment of my debts, after that which has been specifically devised to my dear wife, I hereby charge the payment of my debts on the property devised to my three daughters, *Sarah Bailey, Ann Martin, and Mary Lee*; and not on that devised or bequeathed to my daughter *Catherine Rogers*. And it is my will and desire, that my trustees appropriate the rents and profits of the shares of my said daughters *Sarah Bailey, Ann Martin and Mary Lee*, to the extinguishment of my said debts.

‘It is my will, that the personal property, *to wit*: all my household furniture specifically bequeathed to my wife, as also the plate to her and her daughter *Catherine*, as also the three horses, three cows, hogs, carriage, wagon, and farming utensils be exonerated from the payment of my debts; but that the same be a lien, in the first instance, on the shares given to *Mrs. Martin, Bailey, and Lee*.

‘I give and bequeath also to my daughter *Catherine Rogers*, six table spoons marked C. R.

‘If any of my children, *viz. Sarah Bailey, Ann Martin, Mary Lee, or Catherine Rogers*, die without leaving issue at the time of their death, or if leaving issue they die without issue before they arrive at the age of twenty-one years; it is my will, that my trustees, and the survivor of them, and the heirs of such survivor, hold his, her, or their share or shares, if more than one, in trust to and for all my surviving daughter or daughters; and the issue of any daughter is to be considered as a surviving daughter and to represent the mother or parent, *per stirpes*.

‘When any limitation in this will is made to children or daughters, my meaning is, that the same comprise their issue; that is, my grand, great grand-children, and so *in infinitum*. And they are to take *per stirpes, to wit*: issue to take any one of my daughter’s share; it being my intention, that no one part or share of my property, on the death of any of my daughters, shall go to the surviving sisters, as long as children or issue shall represent any of my deceased daughters.

‘Also my slaves are to be manumitted, notwithstanding my personal property be insufficient to pay my debts; it being my intention, that the same be charged on the three shares of my real estate, so as

above devised to my daughters *Bailey*, *Martin*, and *Lee*, in the first instance, in order to enable them to be manumitted at all events, and to enable my wife and daughters to receive their legacies also ; my dear wife is also to have the one-third of the annual income of my property situate on Baltimore and Calvert streets.'

This will was proved in the usual form by the subscribing witnesses on the 8th of January, 1806, after which the following notes were addressed to the Orphans Court. 'Being appointed by *Charles Rogers*, deceased, one of his executors and trustees to his estate, I decline from serving. Given under my hand this 18th day of January, 1806, *Nicholas Hopkins*.' 'To the Orphans Court for Baltimore county : Baltimore, 21st January, 1806. I hereby renounce my right of acting as executor or trustee under the appointment in the will of the late *Mr. Charles Rogers*.—*William R. Smith*.' 'Whereas I have seen the last will and testament of my friend *Charles Rogers*, deceased, by which I am appointed one of his executors, and one of the trustees to his estate ; but finding myself very infirm and of great bodily weakness, am under the necessity of declining to act in either capacity. Given under my hand at Baltimore, this 11th day of January, 1806.—*John Merryman*. *William Buchanan*, Register.'

The plaintiffs further stated, that the trustees, *Merryman* and *Smith*, had refused to take upon themselves the trust proposed to be confided in them by this will ; and as there was no provision, made by the testator, for having the trusts executed by one trustee alone ; (a) nor any compensation allowed to all the trustees ; or to the one trustee, *Hopkins*, who was willing to undertake the trust ; the bill prayed, that *Hopkins* might be authorized to act alone ; and that he might be compensated for his trouble.

The defendants *Merryman* and *Smith*, by their answer, admitted the facts as set forth, renounced all right to act as trustees, and left the matter to be disposed of by such decree as might be deemed proper.

27th February, 1806.—KILTY, Chancellor.—DECREED, that *Nicholas Hopkins* be appointed trustee for the purpose of carrying into effect the will of *Charles Rogers*, deceased, in as full and ample manner as the defendants *Merryman* and *Smith*, and the plaintiff *Hopkins* were directed and empowered by the will of the deceased : provided, that *Hopkins*, before he acts as such, files with the

(a) Co. Litt. 113 a.; Ram. on Assets, 76 ; 1828, ch. 174 ; 1831, ch. 311, s. 11.

register a bond to the state with surety to be approved by the Chancellor in the penalty of \$30,000, conditioned for the faithful performance of the trust reposed in him, &c. (b)

After the passing of this decree, *Hopkins* refused to take upon himself the trust; in consequence of which the plaintiffs, with the other devisees, by a petition signed by them, recommended *Samuel Vincent* to be appointed.

4th April, 1806.—KILTY, Chancellor.—*Nicholas Hopkins*, heretofore appointed trustee for the purpose of carrying into effect the will of *Charles Rogers*, having, in writing, refused to accept the said trust; it is, therefore, *Decreed*, on the recommendation of *Sarah Rogers*, *Alexander and Ann Martin*, *Mary Lee*, and *James P. Boyd* for *Catherine Rogers*, that *Samuel Vincent* be and he is hereby appointed trustee for the purposes aforesaid, with all and singular the powers vested in the former trustee by the original decree: provided, that before he shall act as trustee aforesaid, he shall file in this court, a bond with such penalty and security as was prescribed for the former trustee by the original decree.

This trustee gave bond accordingly; after which, *Sarah Rogers*, *Alexander Martin*, and *Ann* his wife, *George Lee*, and *Mary*, his wife, and *Catherine Rogers*, as devisees of the testator *Charles Rogers*, by their petition stated, that although the affairs of the estate were then unsettled; yet a division might be very advantageously made among them, subject to the payment of the debts of the deceased. Whereupon they prayed, that a partition might be made, &c.

22d November, 1806.—KILTY, Chancellor.—The Chancellor has considered this petition, and does not perceive how it can be complied with, consistently with the decree already passed, on which no report has been made by this trustee. The Chancellor refers the petitioners to the objections stated by him to the bill, soon after

(b) The *ex parte* proceeding by petition under the act of 1785, ch. 72, s. 4, applies only to cases where a testator has left 'real or personal estate to be sold for the payment of debts, or other purposes,' and there is no one appointed to make the sale; or he who has been appointed to do so, neglects or refuses to execute such trust. This, it is proper to recollect, is not a case where the testator had left his estate to be sold for any purpose. And it has been provided, that on the death of a trustee, having no beneficial interest in the lands, the heir at common law shall succeed to the trust estate so held; 1831, ch. 311, s. 11.

the said decree, in order to obtain a partition; but will hear them at any time in support of the present petition.

The trustee *Vincent*, reported that there would be no necessity to sell any of the real estate of the deceased to pay his debts, as there was reason to believe, that they might be all satisfied from the personsl assets, in the hands of the administratrix, and with the rents and profits of the real estate, which would then soon be collected. And he also, some years after reported, that *Sarah*, who was the widow of the testator, was dead; and at the same time, returned accounts, in which he had, as he said, stated an account with her executor, and also with the devisees.

18th May, 1810.—KILTY, Chancellor.—An account rendered by *Samuel Vincent*, trustee to the estate of *Charles Rogers*, has been laid before the Chancellor without any report, excepting what is stated in a short note, and in another sent with it, which are neither of them drawn in a formal manner, or calculated to explain the nature of the account. No vouchers are exhibited; but the account appears to be approved by the executors. The Auditor is directed to examine and report on this account, and the statement made therewith, having reference to the proceedings in court, under which *Samuel Vincent* was appointed trustee.

In obedience to this order the Auditor reported, that he had stated an account between the trustee and the executors of *Sarah Rogers*; from which there appeared to be due to them the sum of £72 9s. 0d; that he had stated another account between the trustee and the estate of the testator *Charles Rogers*, from which it appeared, that there was then in the trustee's hands £1057 11s. 5d. arising from rents received by him, over and above the sum stated as due to the executors of *Sarah Rogers*; that it did not appear how this sum was to be distributed; or whether there were any debts due from the estate; and that the accounts had been stated by him without any proof or voucher, other than the trustee's own statements.

19th May, 1810.—KILTY, Chancellor.—On considering this report and the accounts therein referred to, the chancellor is of opinion, that no order can, at present, be passed respecting the accounts exhibited by the trustee. But the subject will be again considered on application of the parties interested, or any of them, or of the trustee for any specific direction.

After which, the trustee filed an account, on oath, with vouchers, on which the auditor reported two statements; one showing the balance in the trustee's hands, due to the legal representatives of *Charles Rogers*, viz: \$2,889 47; and the other showing the balance due to the representatives of *Sarah Rogers*, viz: \$227 83 from the third part of the rents.

12th September, 1810.—KILTY, Chancellor.—It is Ordered, that the said report and statements be confirmed; but before any application of the balance can be made, it is necessary for the court to be informed of the situation of the heirs, to whom their proportions ought to be paid, and their separate receipts, taken according to the will; although it is stated by the trustee, that, they conceive, they have nothing to do with the business. The trustee is directed to report to the chancellor the names, situation, and places of residence of the heirs; and any further knowledge which he may have obtained as to the debts, and the means of paying them; and the object, and present situation of the suit mentioned by him.

The trustee *Vincent* reported, in obedience to this order, that the testator *Charles Rogers* left, at the time of his death, the following children and devisees, namely, *Sarah* wife of *Henry E. Bailey*, *Catharine* wife of *John Diffenderffer*, who were then living; *Ann* wife of *Alexander Martin*, who died without issue about the 4th of May, 1807, after having by will given a legacy to her husband's mother, and devised her estate to her husband's daughter, who then resided in Massachusetts; and *Mary* the wife of *George Lee*, who by her will devised her estate to her husband, who was then living in Baltimore, died leaving no child. That *Sarah* the widow of the testator was then dead, after having by will bequeathed several legacies; but what debts she owed, or what estate she left, except as before reported, this trustee could not say. That the debts of *Charles Rogers* had been all paid, that came to the trustee's knowledge; except a small account in settling of which there had been some little difficulty, but of small consequence. That the devisees *Bailey* and wife, and *Diffenderffer* and wife instituted a suit in Baltimore county court claiming the whole estate, after the death of *Ann Martin* and *Mary Lee* as vested in them, under the will of *Charles Rogers*; and that suit was determined by said court in favor of *Mrs. Bailey* and *Mrs. Diffenderffer* by the opinion of the court, that the estate of said *Rogers* vested in them

under his will, upon the death of *Mrs. Martin* and *Mrs. Lee*. Such this trustee has understood to be the nature of the said action and the judgment of the court; from which an appeal was made, and the record now remains in the Court of Appeals for trial there. That the money of the estate, in this trustee's hands, he is and has been ready to pay over as his Honor shall direct, as well the part audited to the widow, as that to the heirs; who are satisfied on that subject, waiting only for a decision in the Court of Appeals. That the balance due *Sarah Rogers*, at her death, this trustee has been ready and willing to pay to the executors, and would have paid; but the heirs, although not disputing the account, conceived the money due on that account ought not to be paid until the determination of the Court of Appeals.

15th December, 1810.—*KILTY, Chancellor*.—Since the order of the 12th of September last a report has been made by the trustee of the matters directed therein; by which it appears, that the debts of *Charles Rogers* have been paid; except an account of small consequence; and the executors of *Sarah Rogers* have informed the court, that they wait for the sanction of the account rendered by the trustee. On this part of the case the trustee is authorized and directed to pay to the said executors of *Sarah Rogers* the sum reported due to her representatives, being \$227 83. As to the balance of \$2,889 47 due to the heirs, the trustee is authorized and directed to pay one-fourth part thereof to *Sarah Bailey*, and to take her separate receipt therefor, according to the will of *Charles Rogers*; and one-fourth part to *Catharine Diffenderffer*, taking her separate receipt therefor. For the two other fourth parts a further order will be given on the determination of the appeal in the suit mentioned in the report.

Some years after which, the trustee *Vincent*, in a letter, dated on the 23d of November, 1814, addressed to the chancellor, says, 'I inform you of my resignation of the trust in the estate of the late *Charles Rogers*, and have given it into the hands of Mr. *John Diffenderffer* one of the heirs at law.' There does not appear to have been any order passed upon this resignation; but on an application, dated on the 20th of December following, made by *John Diffenderffer*, in which, among other things, he says, 'on examining the account of Mr. *Samuel Vincent*, trustee of the late *Charles Rogers*' estate, I find, that he has charged a considerable sum of money to *Sarah Bailey*, *Ann Martin*, and *Mary Lee*; it appears to me, by

the will of the late *Charles Rogers*, that they are not to receive, or entitled to any, till his debts were paid, which was completed on the 9th April, 1808.'

25th March, 1815.—KILTY, Chancellor.—On the application of *John Diffenderffer*, who married one of the heirs, and on the resignation of *Samuel Vincent* the trustee, the chancellor has examined the former proceedings. Before any further order can be made it will be necessary for him to be furnished with a transcript of the proceedings in the suit by *Mrs. Bailey* and *Mrs. Diffenderffer* which were carried to the Court of Appeals as mentioned in the report of *Samuel Vincent*.

This case having been again brought before the court, and some further explanations given as to the particulars mentioned in the last report of the trustee *Vincent*.

8th July, 1817.—KILTY, Chancellor.—It being represented, that there is an error in the report, as to the suits in the Court of Appeals mentioned in the order of March 25th, 1815, the auditor may proceed to examine the reports and vouchers, without waiting for the transcript, and report thereon, giving notice to the former and present trustee.

In obedience to this order the auditor, on the 23d of December, 1818, stated and reported several accounts as required, for performing which service, his legal fees amounted to \$84. After which, the auditor, by his petition, stated, that the former trustee *Vincent*, and *John Diffenderffer*, who had been recognized by the court as trustee in the room of *Vincent*, although no order for his appointment appeared among the papers, had both of them neglected and refused to pay his fees, although *Diffenderffer* had always had in his hands funds of the estate to a large amount. Whereupon the auditor prayed, that *Diffenderffer* might be ordered to pay, &c.

18th October, 1819.—KILTY, Chancellor.—Ordered, that *John Diffenderffer* pay to the Auditor the sum of \$84, on or before the 10th day of November next, or shew cause to the contrary; provided, that a copy of the petition and of this order be served on him before the 28th instant.

These are all the proceedings which appear to have been had in the case of *Rogers v. Merryman*, when *Winder* and wife instituted this suit against *John Diffenderffer* and others.

These plaintiffs, *Winder* and wife, by their bill, stated that *Charles Rogers*, after having made his will, as before set forth, died,

leaving a large estate, and four children his devisees, *Sarah, Ann, Mary* and *Catherine*; that the trustees appointed by the will of the testator, all refused to take upon themselves the trust, and were then dead; that no trustee to carry into effect the object of the will had ever been appointed by any competent authority; that *Sarah* married, and afterwards died, leaving the plaintiff *Araminta*, her only child and heir; that *Ann* and *Mary* had married, and afterwards died without issue; that *Catherine* married the defendant *John*, and was since dead, leaving these infant defendants her children, and heirs at law; that after the death of *Ann* and *Mary*, the defendant *John Diffenderffer* took the property so devised, into his possession, as the estate of the three infant defendants, his children, and had ever since received the rents and profits thereof. Whereupon these plaintiffs by their bill prayed, that a division of the estate, so devised might be made among the legal representatives of the devisees of the testator, *Charles Rogers*, according to their respective interests; and also, that the defendant *John Diffenderffer* might account for the rents and profits; and that they might have such other relief as the nature of the case might require, &c.

The defendant *John Diffenderffer*, by his answer, admitted, that *Charles Rogers* had made his will and died, leaving a large estate, and four daughters as set forth in the bill; that *Sarah* had died leaving the plaintiff *Araminta*, her only child, who had married the other plaintiff *William*; that this defendant had married *Catherine*, who was then dead, leaving the three other defendants, her children and heirs, who were all then minors; that the trustees, appointed by the testator *Charles Rogers*, had refused to undertake the trust, in consequence of which, an application had been made to this court, and a trustee appointed, as set forth in the proceedings in the case of *Rogers v. Merryman*; that this defendant had, from time to time, received from the trustee *Vincent*, sums of money, on account of the distributive share due to his wife; and there remained a large balance due to her; whilst the other parties received considerable sums more than was due to them; that *Ann Martin* died on the 5th of May, 1807; and *Mary Lee* on the 21st of January, 1808, both without issue; that, at the request of the trustee *Vincent*, this defendant had taken possession of the property on Calvert and Baltimore streets; and also of sundry ground rents in the city of Baltimore, which he had a right to do under the will, after the death of *Ann* and *Mary*, whereby the estate survived to his children, the heirs of *Catherine*; that he

had received from the estate, from the 16th of January, 1815, to the 28th of November, 1825, deducting the amount paid for taxes, repairs, &c. the sum of \$24,149 35½, for all which he was ready to account; that he had not taken possession of any other part of the testator's estate, or received any other rents and profits than those specified; and that the property devised to *Sarah* was more than her equal proportion of her father's estate.

The three infant defendants put in their answers by guardian *ad litem*, in which they stated, that they had no knowledge of the matters set forth in the bill; and prayed, that their interests might be protected, &c.

To these answers the plaintiffs put in a general replication; and commissions were issued to take testimony; under which the depositions of sundry witnesses were taken and returned on the 7th of September, 1827. After which the defendant *John Diffenderffer* with the consent of parties, was allowed to amend his answer; in which amended answer, he stated, that the devisee *Ann*, with her husband *Alexander Martin*, had executed a conveyance of the property devised to her, whereby she had docked the estate tail therein given to her; so that *William Hitchborn* became seized thereof in fee simple, in trust for her sole and separate use; after which she had, by her last will devised the property as therein specified and died.

7th April, 1828.—BLAND, Chancellor.—This case standing ready for hearing, and the solicitors of the parties having been heard, the proceedings were read and considered.

After an attentive consideration of the will of the late *Charles Rogers*, upon the true construction of which this controversy turns, it is my opinion, that he devised the property, mentioned in the complainants' bill, to his daughters for life, with remainder to their children in fee simple; and upon the death of any one daughter, without children, then her share was to go to the survivors and their children. There is nothing in this will which shews it to have been the intention of the testator, that his daughters, or their issue should take an estate tail only. All four of his daughters are now dead, and two of them, *Ann* and *Mary*, have left no issue; consequently, the undivided shares of the property, in the proceedings mentioned, which were devised to the late *Ann* and *Mary*, must pass, in two equal parts to the testator's grand-children, the one-half part thereof to the plaintiff *Araminta*, as the daughter and sole heir of the late *Sarah*; and the other half part thereof to be equally divided among *Amelia Diffenderffer*, *Michael Diffenderffer*

and *Charles Rogers Diffenderffer*, as the children and heirs of the late *Catherine*. The bill prays for a partition of the estate ; and for an account of the rents and profits. These prayers will be granted.

Decreed, that there be a partition of the lands, in the proceedings mentioned ; and to the end, that this court may be enabled to make a just partition thereof ; it is *Ordered*, that a commission issue to *James Mosher, Benjamin C. Ridgate, Henry Didier, William F. Small, and Joseph Barling*, authorizing them or any three of them to enter upon, walk over and survey the said land ; and to divide the same, if it shall admit of division, according to the rights and interests of the respective parties ; that is to say, two-thirds of the whole of that which was devised to the said late *Ann, Mary and Catherine*, as in the proceedings mentioned, to be laid off as the portion of those who are to take on the death of the said late *Ann and Mary*, without issue ; which two-thirds is to be divided into two equal parts, one of which is to be allotted to the plaintiff *Araminta* ; and the other half of the said two-thirds, together with the said one-third of the whole, as the portion to which the children of the late *Catherine* are entitled, to be divided into three equal parts ; one of which shall be allotted to the said *Amelia Diffenderffer*, one other third part thereof to the said *Michael Diffenderffer* ; and the remaining third part to the said *Charles Rogers Diffenderffer* ; having regard to quantity and quality ; and the said commissioners be directed in the commission to make out a plot and certificate of the said land, and of the divisions thereof, and an accurate description of the same, and of the several parts thereof, and of the value of each ; and to the said commission there shall be annexed, as usual, an oath of office.

And it is further *Decreed*, that the said *John Diffenderffer* render a full and true account of the rents and profits of the property, in the proceedings mentioned, during the whole time the same has been, or may remain in his possession, or under his control. That the auditor state the account relative thereto from the evidence in the cause, and such other evidence as may be taken by either party before the commissioners *Benjamin C. Ridgate and William Magruder* of the city of Baltimore, on giving two days notice as usual ; provided, that the same be taken and filed in this case on or before the fifth day of July next.

A commission was issued as directed by this decree ; upon which the commissioners made a return, that they had made a par-

tition of all the property in the proceedings mentioned as described; except the lot of ground at the corner of Baltimore and Calvert streets in the city of Baltimore, which would not, in their opinion, admit of division; and that the interests of the parties required, that it should be sold. Whereupon the parties, by an agreement in writing, consented that it should be sold as recommended.

26th July, 1828.—BLAND, *Chancellor*.—*Decreed*, that the lot of ground at the corner of Baltimore and Calvert streets, as mentioned in the return of the commissioners, be sold; that *John Glenn* and *George Winchester* be appointed trustees to make the sale, &c. the terms of which shall be, one-fifth part of the purchase money to be paid in sixty days from the day of sale, the other four-fifths within six, ten, fourteen, and eighteen months from the day of sale, with interest on each instalment from the day of sale, to be secured by bonds with approved surety, &c.

Under the decree of the 7th of April, the parties took; and, on the 2d of September returned the depositions of sundry witnesses, and among them, that of the defendant *John Diffenderffer*, who consented to be examined as a witness on behalf of the plaintiffs. And the trustees, under the decree of the 26th of July reported, that they had made sale of the lot of ground, therein mentioned, to *John Clarke* for the sum of \$27,200; which sale, after publication of the usual order unless cause shewn, was absolutely ratified on the 25th of November, 1828. And the distribution of the proceeds thereof, as stated by the auditor, was ratified on the 10th of December of the same year.

13th October, 1828.—BLAND, *Chancellor*.—*Decreed*, that the return of the commissioners and the partition by them made be and the same is hereby ratified and confirmed.

And it is further *Decreed*, that *William S. Winder* and *Araminta Winder* his wife, in right of the said *Araminta Winder*, shall hold in severalty and not jointly with the other parties to this suit, one third of the real and leasehold estate within the lines of *Gallow Barrow* and *Rogers' Inspection*, of the estate of *Charles Rogers* deceased, and which is particularly designated and described by commissioners in their said return as follows, &c.: (So in like form as to the others).

And it is further *Decreed*, that each of the before mentioned parties, among whom the property and estate herein before mentioned, has been divided; and to whom it has been adjudged to be held in severalty by this decree, pay his or her own costs, to be taxed

by the register, in due proportion to the amount of property to him or her adjudged and awarded.

The auditor reported on the 10th of November, 1828, that he had stated several accounts, some at the instance of the plaintiffs; and others according to the instructions of the defendant *John Diffenderffer*; and had then stated an account marked D. agreeably to his own views of the justice of the case; in which he had allowed the trustee *Diffenderffer* a commission of ten per cent. as allowed to the former trustee; but he had charged interest on the balances in the trustee's hands at the end of each year. As these balances consisted in part of interest, charged on former balances in hand, the trustee was thus charged with compound interest. But as this account might, in this particular, be questioned, he had stated another account, in which interest was not so charged. And that in continuation of each account he had distributed the balance, in the trustee's hands, amongst the plaintiffs and the infant defendants; allowing the complainants one-third of the balances, and to each of those defendants one-third of the remaining two-thirds.

To these accounts the plaintiffs filed the following exceptions: They excepted to account A; because, interest is not properly charged therein; because, a credit is allowed for various sums for which no credit can, or ought to be claimed; because, a commission is therein allowed to *John Diffenderffer*; because, a credit is allowed for rent, not received of *Mrs. Sparks'* family, under a representation, that it was lost by default of the complainants' solicitor, when, in truth, no such default ever existed, and no proof is made of it; and because, in other respects, the account is insufficient and defective and against the proof in the cause. They excepted to account B; because, interest is not properly charged therein; because, various credits are there given which ought not to be allowed said *Diffenderffer*; and because, the account is defective and unsupported by proof. They excepted to account D; because the trustee is allowed a commission of ten per cent.; because interest is improperly charged, not a sufficient amount being allowed to the complainants; and because, the account is otherwise defective and against evidence. And they excepted to account E; because, the said *John Diffenderffer* is not therein charged with interest enough; and because, said account is otherwise insufficient, defective and against evidence.

The defendant *John Diffenderffer* excepted to the report of the auditor, and the accounts C, D, and E, therewith returned; because he is, in the said accounts, charged with the payment of interest, with which he is not chargeable in law; because, in the said accounts, he is charged with compound interest, which is altogether illegal and unjust; because, in the said accounts, he is not allowed interest on the sums with which he is credited; because, in the account C, he is not allowed a commission or compensation in any form; because, in the said accounts, he is not allowed the credits claimed, and stated in accounts A and B; because, all the said accounts, stated and reported by the auditor, except A, are erroneous, unjust, and illegal; and because, the auditor has assumed the statements of the former auditor as correct, whereas the same are erroneous in law and fact; particularly in regard to the sum of \$2,578 77, charged as over payments to *Mrs. Lee*, *Mrs. Martin*, and *Mrs. Bailey*.

After which the defendant *John Diffenderffer* by his petition, accompanied by an affidavit of *Paul G. Hands* in relation to the matter of the petition, stated, that since the report of the auditor, he, the petitioner, had discovered material and important testimony, requiring additional accounts to be stated, in order to bring a full and perfect view of the defendant's case before the chancellor. He therefore prayed, that the case might be again sent to the auditor with leave to take further testimony, &c.

21st February, 1829.—BLAND, Chancellor.—Ordered, that this case be referred to the auditor with instructions to state such further accounts as may be required by the parties upon the testimony in the case, and such other proofs as may be produced before him, on giving the usual notice: And either party may take testimony before the commissioners appointed for Baltimore county, or any justice of the peace on giving three days notice as usual; provided, that such testimony be taken and filed in the chancery office before the seventh day of March next.

The auditor reported, that under this order he had taken the deposition of *Paul G. Hands*, and as his testimony related altogether to the account of the trustee *Vincent*, he had corrected that account accordingly; and that he had, by the instructions of the defendant *John Diffenderffer*, stated another account, marked F, which differed from account B, returned with his former report. To this account the plaintiffs excepted. And, on the application of the plaintiffs,

the time allowed for taking testimony under the order of the 21st of February was, by an order of the 13th of April, 1829, enlarged.

Under the authority of this order the plaintiffs caused the cashier and book-keeper of the Mechanics' Bank of Baltimore to be summoned to appear before the commissioners to testify; and to produce a statement of the account in the said bank of *John Diffenderffer* from 1815 to 1829. And the plaintiffs propounded to them certain interrogatories, which were returned by the commissioners and filed here on the 20th of April, 1829, and are as follows: *First*. Do you know *John Diffenderffer*, of the city of Baltimore, who is one of the defendants in this case; and how long have you known him? *Second*. Are you now, and how long have you been an officer in the Mechanics' Bank of Baltimore; and what office in said bank do you hold? *Third*. Do you know whether the said defendant *John Diffenderffer* keeps his bank account in the said bank; and for what period he has so kept his account? *Fourth*. Do you know whether he has, during the time his said account was kept in said bank, kept an account with any other bank in this city or elsewhere? *Fifth*. Have you recently, and at what time, examined the said account of said *John Diffenderffer* with said Mechanics' Bank? If you have, what was the state of said account at the several periods from the year eighteen hundred and fifteen to the present time when the same was balanced? State the exact account of the balances at each of said settlements, and the times at which said settlements were severally made?

The cashier appeared, and objected to be examined on those interrogatories. And the defendant *John Diffenderffer* also appeared, and objected to the examination of the cashier of the Mechanics' Bank, upon the interrogatories filed by the complainant. *First*, because he is not a competent witness in this cause; *second*, because he has no legal right to exhibit the account of the said defendant with the bank, during the period referred to in the interrogatory; and *third*, because he objects to their putting the interrogatory to the cashier, or any other officer of the bank; or to the production of the books of the bank, or any copy thereof, until an order from the court has been obtained for that purpose. And the defendant *John Diffenderffer*, by his petition, filed with the return of the commissioners, prayed to be heard upon the matter.

4th May, 1829.—BLAND, Chancellor.—The matter of the petition of the defendant *John Diffenderffer*, standing ready for hearing

and the solicitors of the parties having been fully heard, the proceedings were read and considered.

The execution of so much of the decree of the 7th of April, 1828, as directs the defendant *John Diffenderffer*, to render a full account of the rents and profits, is all that remains of this case; and, consequently, no testimony ought now to be taken which is not, in some way, pertinent to that matter.

In the argument, it was mainly urged, on the part of this defendant, that these interrogatories went to discredit the testimony he had consented to give, at the instance of the plaintiffs, in September last; and that having been made a witness by the plaintiffs on their own behalf; they could not now discredit their own witness. And, in the next place, that the testimony called for by the interrogatories, was improper and irrelevant.

I have never before been called on to decide upon any such objections; nor have I met with any case where similar objections have been made by a party, to the further progress of the examination of witnesses, either in the English books, or among the records of this court. Yet, from the manner in which this case has been treated, the right to have the responses to the interrogatories withheld, until such objections, made by a party to the suit, could be decided on by the court, seems to have been conceded on all hands. Nothing was said about the right of a party to make such objections; or as to their effect when made; or as to the time and manner in which they were to be brought before the court and determined. And yet these are matters, which certainly ought not to be overlooked in a case of the very first impression. The determination called for, it is evident, must be of great importance, as regards the course, and practice of this court. Looking to those consequences, I deemed it proper to hold the matter under advisement until I could bestow upon it a careful consideration.

The mode of bringing testimony into a Court of Chancery, differs from that by which it is brought into a court of common law; and the manner of collecting proofs in the Maryland Court of Chancery is, in many respects, different from that pursued by the English court. But the object in all is, or should be, to arrive at the truth, with the least possible expense and delay; and, consequently, all the established forms of judicial proceeding, in relation to this subject, should be made to bend in subservience to this great object. When an issue, as to any matter of fact, has been made up in chancery, a commission may be obtained to collect proofs in

relation to it. The mode of obtaining such a commission, and of selecting the commissioners, to whom it is to be directed, are, in some particulars, different, in England, from those which, by usage, the rules of the court, and legislative enactments, have been prescribed for attaining the same objects here. All which may, however, be passed over as unimportant as regards the matter now under consideration.

In England, the interrogatories, intended to be propounded to the witnesses, must accompany the commission, or be handed to the commissioners before they actually begin to execute it. (*c*) And according to the ancient orders, and the long established practice, they must be so drawn as to call forth only those facts which may be used as evidence in the cause. To prevent the introduction of impertinence and scandal, it is directed, that they shall be drawn or sanctioned by counsel; that they shall be penned with care, so that they be pertinent, and only to the points necessary; and that the witnesses be sorted and examined on those interrogatories only to which their testimony extends, without the needless interrogatories of matters unnecessary or immaterial; as well to avoid the expense of superfluous examinations, as that apt interrogatories, which are the very life of the case, may be exhibited. (*d*) The party, who applies for and obtains a commission, has the carriage of it; and it is his duty to give notice to the commissioners and to the opposite party, of the time and place, when and where it is to be executed. (*e*) At which time and place, the witnesses also are summoned to convene; and if they neglect or refuse to do so, on the fact being represented to the court, they may be compelled to attend.

When the commissioners have met, and they and their clerk, have taken the prescribed oath, which requires them to keep the testimony taken by them secret, until it shall be legally published, and they are prepared to proceed, they then exclude every one else from the apartment in which they sit, and call in only one witness at a time, to whom they propound the interrogatories in succession. And, after examining the witness on each interrogatory, they carefully take down in writing what he declares in relation thereto. (*f*)

(*c*) Forum Rom. 127.—(*d*) Beam's Orders, 184; 1 Harr. Prac. Chan. 456, 485.—(*e*) 1 Harr. Prac. Chan. 441.

(*f*) 3 Blac. Com. 449; 1 Harr. Prac. Chan. 462. In the year 1707, among many other complaints made against the proceedings in chancery, it was alleged, 'that commissioners to examine witnesses, and their clerks, were not upon oath, which lets them at liberty to discover evidence, and introduces perjury, new commissions,

In doing this, it is their duty to confine themselves and the witness to the substance of the interrogatories; for, if they take down any thing impertinent, it may be suppressed, and the commissioners themselves made to pay the costs. Each witness having been fully examined, and the depositions revised, corrected, and properly certified, the whole must be sealed up, so that no part of the contents can be read, and thus returned to the court. (*g*) When the commissions have been all returned, an order may be obtained for their publication, or in other words, that they be opened, read, and copies taken by all concerned, if required. The examinations being thus brought to a conclusion and made public, no further testimony can be taken in relation to the matter in issue between the parties; unless under very special circumstances. (*h*)

After the publication, but not before, either party may exhibit articles against any witness of his opponent; and obtain a commission to take testimony in support of his articles impeaching the credibility, or the competency of the witness. (*i*) And if any of the interrogatories, or any portion of the testimony be scandalous, or impertinent, and irrelevant to the matter in issue, they may be suppressed at the hearing; or if not, still they must be totally disregarded; since it would be deemed error in the court to ground its decree, upon any such testimony; and the party, at whose instance such impertinent testimony has been taken may be made to pay the costs.

From this mode in which the English Court of Chancery has the testimony of a witness taken, it is manifest, that it would be utterly impracticable, before publication, to suspend the examination until objections to the competency of the witness, or the relevancy of the testimony was determined; because a party cannot, from the general notice given him by his opponent, that such and such persons will be called as witnesses, be prepared to shew the incompetency, or to discredit any one of them without hearing, or knowing the nature of his testimony. Although the incompetency

&c.' Park's *His. Co. Chan.* 284. But by an order or rule of court, passed in the year 1721, the commissioners and their clerks were required to take an oath, impartially to examine the witnesses; and not to disclose their depositions until after publication, Beam's *Orders*, 327; *Forum Rom.* 143. Nor should the witnesses, according to these English principles, disclose their evidence to the parties; *Forum Rom.* 141; *Cooth v. Jackson*, 6 *Ves.* 32.

(*g*) 1 *Harr. Prac. Chan.* 476.—(*h*) 1 *Harr. Prac. Chan.* 458.—(*i*) *Forum Rom.* 147; 1 *Harr. Prac. Chan.* 511.

of a witness arising from infamy, or the like, may be known; yet his interest, or any incompetency deducible from his own disclosures cannot be known; and therefore it is, that articles of impeachment are allowed to be filed after publication, as all such matters are until then sealed up in secret. (*j*) And besides, even if such a course were allowed to a party, the delays he might interpose, by such objections, might be multiplied without end; and, by a sinister ingenuity, a cause might be interminably procrastinated. Hence there is no trace to be found in the English books of any such objections ever having been attempted to be made.

It is a fundamental principle of our law, in criminal matters, that the accused shall have a public trial; and it is manifestly beneficial to all, that the administration of justice, as well civil as criminal, should be open and public in every stage, and in all its branches. It is one of the greatest safeguards of the rights of the citizen, that all judicial officers should be subjected to the salutary influence of public opinion; while on the other hand publicity is the best and the strongest protection, that an upright faithful officer can have or desire. (*k*) This publicity of judicial proceeding which existed in all parts of Europe governed by the Roman law; (*l*) and under those governments which arose immediately out of the fall of the Roman empire, was first abolished, by the papal decretals, towards the close of thirteenth century. The Pope believed, that the secrecy of judicial proceedings would furnish him with a more certain means of extirpating heretics; and the civil tribunals adopted, in succession, an innovation which relieved them from public censure, by concealing the errors they were liable to commit; while the veil of mystery, which enveloped their proceedings, was calculated, in the eyes of the vulgar, to invest them with an air of greater importance. (*m*) The English Chancellors,

(*j*) *Purcell v. McNamara*, 8 Ves. 326.—(*k*) *King v. Daly*, 1 Ves. 270. In the matter of Lord Portsmouth, Coop. Rep. 106. The Chancellor's case, 1 Bland, 681, note; 4 Laing's His. Scotland, 254. 'It is, however, to publicity more than to every thing else put together, that the English system of procedure owes its being the least bad system as yet extant, instead of being the worst. It is for want of this essential principle, more than anything else, that the well meant labours of Frederick and Catherine, in the field of justice, have fallen so far short of the mark at which they aimed,' *per Bentham, Park. Hist. Co. Chan.* 5. 'I know that it is one of the best securities for the honest exercise of a judge's duty, that he is to discharge that duty in public.'—*Per Eldon, Chancellor; Wellesley v. Beaufort*, 3 Cond. Chan. Rep. 9.—(*l*) Adam's Rom. Ant. 241, 255; Kennett's Rom. Ant. 153.—(*m*) 1 Hallam's Mid. Ages, ch. 7; 1 Lond. Jurist, 251

prior to the commencement of the seventeenth century, were almost always appointed from among the dignitaries of the then established catholic church of England; and those ecclesiastical Chancellors gave to the Chancery Court, as a court of equity, its general outline and substantially fashioned its modes of proceeding. (n)

Hence it is fair to conclude, that this mode of collecting testimony, under a solemn injunction of secrecy, was an ecclesiastical contrivance; and that it may be regarded as one of the papal perversions of the mode of administering justice. (o) A slight review of the English authorities upon this subject will be sufficient to show, that this rigid obligation of secrecy in taking testimony is always inconvenient, and often attended with great expense and delay, besides being sometimes made the instrument of the most grievous fraud. (p)

The mode of collecting testimony in the Court of Chancery of Maryland has been altered and materially improved. The whole proceedings under a commission to take testimony have been thrown open; all secrecy has been abolished; and each party is required to be notified, and has a right to be present, and to have his interrogatories publicly propounded to the witnesses. (q)

(n) 3 Blac. Com. 54; Park's His. Co. Chan. 20, 49.—(o) 1 Bro. Civ. Law, 478; The William and Mary, 4 Rob. Ad. Rep. 381.—(p) Cooth v. Jackson, 6 Ves. 12.—(q) In Maryland, as in England, in all cases where evidence was proposed to be collected, under an ordinary commission for that purpose, the commissioners and clerk's oath, sent with the commission, required them to swear, that they would not publish, disclose, or make known to any person the contents of any of the depositions until publication should be passed; *Kent v. Emory*, 22d May, 1769, *Chancery Proceedings*, lib. W. K. No. 1, fol. 332; *Mackall v. Morsell*, 5th March 1770; *ibid*, fol. 224; *Cockey v. Hammond*, 26th August, 1774, *ibid*, fol. 332; *Howell v. Fell*, 21st May, 1783, *Chancery Proceedings*, No. 2, fol. 17; *Usher v. Brown*, 28th February, 1786, *ibid*. 591. And the oath directed to be taken by the register of the High Court of Chancery of Maryland in the year 1670, required him also to swear, that he would not publish or shew, directly or indirectly, the depositions to any person, before publication, without warrant from the court, *Chancery Proceedings*, lib. C. D. fol. 34. In the year 1824, an eminent London solicitor, in speaking of the course of chancery proceedings in England, in this respect, declared, 'that no real remedy for the present evils of the equity jurisdiction existed, but in the general substitution of public *viva voce* testimony for the present system of secret written evidence,' *Park's His. Co. Chan.* 453, 561, 566. But, in Maryland, under a commission to audit and settle accounts, neither the commissioners nor their clerks were sworn to secrecy; and therefore, in such cases, the depositions of witnesses brought before such commissioners were always taken publicly in presence of the parties if they chose to attend; *Clapham v. Thompson*, 1 Bland, 123, note; *Dorsey v. Dulany*, 1 Bland, 465, note. Nor, as it would seem, was there any injunction of secrecy in taking testimony under a

And in fact the mode now of examining a witness, under a commission from this court, except that it is all in writing, is similar in every respect to an examination in a court of common law. He on whose part the witness is called examines him first, and then he is cross-examined by the opposite party; and so on until the whole testimony is taken. The benefit of which cross-examination, strictly and properly so called, and as here understood, cannot be had, under the English secret mode of proceeding. (r) If any thing should be developed, in the course of the examination, from which it appears, that, by other testimony, the incompetency or incredibility of a witness may be shewn, it is not necessary, as in England, to wait for the return of the commission, and for the having of it opened by an order of the court, and then to exhibit articles against the witness; and to take out another commission to bring in proof in support of such articles; (s) but the party may require the commissioners to adjourn their session to another day, and so from time to time, not extending to unreasonable delay, until all the testimony within their reach can be taken; (t) or another commission, for any such purpose, may be at once obtained to any other place, where the requisite testimony may be had. (u)

commission from the Prerogative, now Orphans' Court. *Vallette's Dep. Com. Guide*, 213. And so too as far back as 1729, in all cases, where the parties were allowed by a special interlocutory order to take testimony before a justice of the peace, the depositions were always taken publicly as at present, *Townshend v. Duncan*, ante, 81. But by the act of 1785, ch. 72, s. 14, which was passed and became a law on the 10th of March, 1786, the secret mode of taking testimony was totally abolished, and the parties are now allowed to attend at a public examination before the commissioners, and to propound to the witnesses such interrogatories as they may think proper.—(r) *Moorhouse v. De Passou*, 19 Ves. 433.—(s) *Purcell v. McNamara*, 8 Ves. 326; *Wood v. Hammerton*, 9 Ves. 145; *Mill v. Mill*, 12 Ves. 408.—(t) *Forum Rom.* 129; 1785, ch. 72, s. 14.—(u) These observations may seem to be at variance with that general rule of law, by which all our courts of justice are governed, in all cases, by which each party has thrown upon him the burthen of supporting his own case, and of meeting that of his adversary without knowing, before hand, by what evidence the case of his adversary was to be established, or his own opposed. *Wigram on Discovery*, 93; *Willan v. Willan*, 19 Ves. 591; *The King v. Holland*, 4 T. R. 691. That rule however, operates only so far as to protect a party from being compelled to set forth the proofs and circumstances he means to offer in support of his own case at the trial. But in courts of common law nothing is more frequent, than, after a witness has been examined, to call another to discredit or contradict what the previous witness had testified. The only difference between that mode of proceeding, and this, under a commission, is, that, under a commission, time may be allowed to send for and take the opposing testimony; but, that, in a court of common law, such testimony must be introduced during the trial and without delay. It might seem, that the removal of the mischief of surprise, by a public examination, would be more than counterba-

But although, as in England, the commissioners are, in some respects, to be regarded as the court itself; (*w*) yet there is nothing in our practice, or acts of assembly, which has clothed them with any thing more than mere ministerial powers, for the purpose of taking the examination under the commission. It is their duty to propound the interrogatories as written and handed to them by the respective parties, or their solicitors; and to take down all that the witness declares in answer thereto, rejecting every thing irrelevant to the interrogatory; but nothing more. They have no authority whatever to decide finally upon the competency or credibility of any witness presented to them for examination; nor can they undertake absolutely to determine upon the relevancy of any interrogatory, or the pertinency of any testimony to the points in issue between the parties; because, although the commissioners are not bound to divest themselves entirely of all discretion, as to what is, or is not legal evidence; it is yet finally and exclusively the province of the court to pass judgment upon all such matters. (*x*)

It is evidently as a consequence of the rule which requires the testimony of the witnesses to be taken in secret, that the English practice has rendered it necessary to have all the interrogatories delivered to the commissioners before the examination is begun; and hence, it is almost impossible to avoid, that senseless and unnecessary verbosity, tautology, and scandal, the introduction of which the ancient orders, regulating the English practice, so earnestly and repeatedly endeavour to prevent. (*y*) By our public mode of proceeding, we have been, relieved from all such embarrassments. It is wholly unnecessary, in any case, to file a long formal set of interrogatories to be sent with the commission; unless it should be sent to a distance, or into a foreign country, where the party, or his solicitor cannot attend. But where the party, or his solicitor, who understands the nature of the matters in issue, to which the proofs are to be directed, can be present at the examination of the witnesses, as he always ought to be, the better and more correct mode, instead of sorting the witnesses to whom the respective interrogatories apply, as directed by the English practice, (*z*)

lanced by the danger of perjury; but no instance has occurred, within my recollection, in which it has been intimated, that the proofs had been falsified, or even discoloured by any party who had been thus, by a public examination, fully informed of the testimony of his antagonist,

(*w*) *Cooth v. Jackson*, 6 Ves. 30.—(*x*) *Whitelocke v. Baker*, 13 Ves. 515.—(*y*) *Beam's Orders*, 25, 71, 184, 272, 311, 492.—(*z*) *Whitelocke v. Baker*, 13 Ves. 515.

is to propound to each one of them exactly such interrogatories only, as are most likely to draw forth the testimony he is capable of giving; and then to place each answer immediately under the interrogatory to which it is a response. In this way all unnecessary repetitions would be avoided; and the proofs would be placed in an orderly form, best calculated to prevent confusion, and to facilitate the perusal and consideration of them. (a)

It would seem to be by no means impracticable, under our public mode of examination, to allow a party to the suit to make objections to the competency of witnesses, or to the relevancy of their testimony; and to have the examination suspended until the court should decide upon their validity. In a court of common law this course of proceeding is attended with little delay and no inconvenience; because the parties and witnesses being before the judge who is to decide; the point may be instantly discussed, judgment immediately pronounced, and the examination proceed or otherwise, at once. But according to the mode of taking testimony in chancery, similar despatch could not possibly be had. The examination must stop, the commissioners, parties and witnesses, who had been assembled, at much trouble and expense, must disperse; the commission, with all the proceedings under it, shewing the objection, must be returned to the court; and then the parties must have a day to be heard; without which it would be unfair to pronounce judgment upon any such objection. Now it is perfectly manifest, that such a course would be open to the greatest abuse. The parties might multiply, and in various forms reiterate objections of this kind, so as not only to delay; but actually to render it almost impossible to bring the examination of the witnesses to a conclusion; and the expenses might be reduplicated and increased to an enormous amount. (b) But, besides, I am not satisfied, even if such a course were allowed, that it would be, in all cases, practicable, understandingly, and correctly to decide upon such objections, proceeding from a party, because some other testimony, upon which the validity of such an objection might mainly depend, might not then have been taken and brought before the court.

For these reasons, therefore, as in England, where an order has been passed, which is granted as of course, for the examination of a co-defendant as a witness, his examination cannot be suspended

by an objection to his competency, which must be raised at the hearing, when his deposition is offered to be read in evidence; (c) so here, I shall for the future regard it as a settled principle, governing the practice of this court, that no objection, coming from a party to the suit, to the competency of a witness, or to the relevancy of any interrogatory, or of any testimony shall be allowed to suspend or impede the taking of the proofs. Such objections may, however, be noted by the commissioners in their proceedings, as has been the practice heretofore; (d) and whether so noted or not, they may be made, heard, and determined upon at the final hearing. (e)

But if it appears, that such an objection has been made, at any time, previous to the hearing, either before the commissioners, the auditor, or a justice of the peace, authorized by a special order to take testimony, it must be considered as sufficient notice to put the opposite party upon his guard to meet and repel it, either by a release at the time, so as then, as in cases at common law, immediately to remove the influence of interest from the mind of the witness; or to overcome the objection if he can by other proof. But if no such release be then given, nor other proof be then taken; and it should appear, at the hearing, that the witness was interested the objection must be sustained, and he cannot be then released and re-examined; nor can the hearing of the case be postponed for the purpose of taking any other proof, of which the party had been thus apprised, might be called for; and which it had been in his power to have taken and brought in; as it must be presumed, that he had waived the benefit of that of which he had failed to avail himself, and of which he had had full knowledge. (f) It is, in general,

(c) *Lee v. Atkinson*, 2 Cox. 413; *Murray v. Shadwell*, 2 Ves. and Bea. 405.

(d) *COCKEY v. HAMMOND*.—25th of January, 1775.—The plaintiff's second interrogatory to be asked of Lancelot Todd, is; 'Are you to gain or lose any thing in case the decree in chancery is for, or against the complainant John Cockey?' And then just previous to the heading of the commissioners' return is the following entry, 'Mr. Hammond the defendant, objects to the testimony of Lancelot Todd, as being interested in the event of the cause; and, therefore, desires he may not be examined on his interrogatories.' After which, follows Todd's deposition, in which he answers thus, 'secondly, that he was not to gain or lose anything by a decree in chancery in favour of the complainant.' Nothing further appears in the case, as to this objection.—*Chancery Proceedings*, lib. W. K. No. 1, fol. 829.

(e) *Strike's Case*, 1 Bland 96; *Harwood v. Harwood*, 1806, per Kilty, Chancellor, M. S.; *Johnson v. Berry*, 1810, per Kilty, Chancellor, M. S.—(f) *Callaghan v. Rochfort*, 3 Atk. 643; *Vaughan v. Worrall*, 2 Swan, 400.

true that a party cannot discredit his own witness ; (*g*) and, therefore, if it should appear, at the hearing, as has been objected by this defendant *John Diffenderffer*, that the plaintiffs have, in truth, taken testimony to discredit any one of their own witnesses, such testimony must be rejected. But as the examination cannot be suspended for the purpose of determining the bearing of any testimony, in this respect, or of ascertaining the competency of a witness, the cross-examination, by the party who then makes the objection, cannot be deemed, at the hearing, a waiver of it; because a party cannot be presumed to have waived any ground of claim, or defence, which it was not in his power to have insisted upon, with effect, at an earlier stage of the case. (*h*) No injury or disadvantage to any suitor can arise from this course of proceeding, since the court cannot, in any respect, found its decree upon incompetent or irrelevant testimony; and if it should do so, it would be deemed error, and the decree might, on appeal, be for that cause reversed. (*i*)

I shall, upon the received principles of the English practice, hold the party or his solicitor strictly responsible for the propriety and pertinency of the interrogatories propounded by him to the witnesses. And although commissioners should not confine themselves strictly to the letter of the interrogatories; but ought so to take down every thing, that the whole truth may plainly appear; yet, they should not insert any matter from a witness, not properly and substantially pertinent to the interrogatory propounded. (*j*) Any scandalous, impertinent or irrelevant matter returned under a commission may be suppressed and taken off the file; and the party solicitor, or commissioner on being convicted of the irregularity may be made to pay the costs or otherwise punished; since it is indispensably necessary, that the court should be enabled to vindicate the regularity and purity of its proceedings, and prevent its records from being made the depository of any foul or scandalous matter foreign from the point in controversy. (*k*)

(*g*) *Fenton v. Hughes*, 7 Ves. 290; *Purcell v. McNamara*, 8 Ves. 326; *Wood v. Hammerton*, 9 Ves. 145; *Queen v. The State*, 5 H. and J. 232; 1 Bro. Civ. Law, 478; said to be otherwise in criminal cases; *State v. Norris*, 1 Hayw. Rep. 433.—(*h*) *Moorhouse v. De Passau*, 19 Ves. 433; S. C. Coop. 300; *Harrison v. Courtauld*, 4 Cond. Chan. Rep. 499.—(*i*) *Clarke v. Turton*, 11 Ves. 240.—(*j*) 4 Inst. 278; *Whitelocke v. Baker*, 13 Ves. 515.—(*k*) *Sandford v. Remington*, 2 Ves. jun. 189; *Cooth v. Jackson*, 6 Ves. 41; *Eastham v. Liddell*, 12 Ves. 201; *Mill v. Mill*, 12 Ves. 408; 1 Harr. Pra. Chan. 455.

I have so far only considered and disposed of the objections proceeding from the party to the suit; but, in this case, the witness himself has refused to answer. According to our law, no man can be compelled to criminate himself; and no attorney can be allowed to divulge the secrets of his client. In these and some other similar instances the law affords to the witness, or his client a protection of which he must not be deprived; and hence he cannot be compelled to give any answer before the commissioners which would go to admit his criminality, or to divulge the secrets of his client. (*l*) When the witness himself makes an objection of this kind, it becomes indispensably necessary to suspend the examination until it is determined upon; because, there is no other possible mode of sustaining his protection, should he be entitled to it. But then the situation of the witness must be so described as to shew how he, or his client is entitled to the protection claimed, to enable this court, in like manner as a court of common law, to judge of its validity. In this, as in the English court of chancery, the only way in which a witness can protect himself, is to state his objection before the commissioners, who return the commission with, what is called, the witnesses' demurrer; and the question is brought before the court by setting it down for argument. Certainly it is not, strictly speaking, a demurrer, which is an instrument, that admits facts stated for the purpose of taking the opinion of the court; but by an abuse of the term, the witness' objection to answer is called a demurrer in the popular sense. And there must be a way by which the court can judicially determine its validity. If the demurrer of the witness be overruled he may be made to pay the costs. (*m*)

This witness has assigned no reason for his refusal to answer; and his situation is no otherwise described than by his being designated as the cashier of the Mechanics' Bank. It is neither expressly declared, nor to be inferred from any thing which does appear, that the witness has rested his refusal to answer upon any one of the established legal protections. It is clear, that he cannot demur, because the questions asked him are

(*l*) *Bolton v. Corporation Liverpool*, 6 Cond. Chan. Rep. 515; *Greenough v. Gaskell*, 6 Cond. Chan. Rep. 518; *Falmouth v. Moss*, 5 Exch. Rep. 158.—(*m*) *Smithson v. Hardcastle*, 1 Dick. 96; *Wardel v. Dent*, 1 Dick. 334; *Vaillant v. Dodemead*, 2 Atk. 524; *Nightingale v. Dodd*, Amb. 583; *Parkhurst v. Lowten*, 2 Swan. 194; *Davis v. Reid*, 7 Cond. Chan. Rep. 488; *McKenzie v. Towson*, 1806, per Kilty, Chancellor, M. S.; *Singleton v. Edmondson*, 1806, per Kilty, Chancellor, M. S.

not pertinent to the matter in issue. (*n*) It surely cannot be pretended, that an individual, because it happens to be convenient to withhold a statement of his dealings with a party to the suit, pertinent to the matter in issue, from being used as evidence in that suit, should, therefore, be permitted to do so at his pleasure. A bank, as a body politic, is endowed with many attributes of personality; and acts as an individual in its dealings with all persons; consequently it can have no pretension to any greater right, arising from its mere character as a body politic, than any individual whatever to withhold any legal evidence, that may be in its possession. It is the duty of an executor or trustee to keep distinct accounts of the property which he himself is bound to administer. But if he blends them in accounts with others, and puts the accounts of his testator or the *cestue qui trust* into his banking or any other books, with the knowledge and approbation of those who may have a separate interest in such books, the *cestue qui trust* will have a right to see every part of such original books which contain any thing in relation to the transaction in which he has an interest. (*o*)

The act of Assembly upon this subject relates to the documentary evidence in possession of a party to a suit; (*p*) and as regards this court, has been truly considered as merely an affirmance of its powers. (*q*) But where certain specified books and papers are in the hands of third persons, and the evidence they contain, materially bearing on the matter in issue, is distinctly designated, as in this instance, it is clear that a court of equity, as well as a court of common law, may resort to competent means to compel the production of such specified written testimony, as well as verbal proof; since the power to do so is essential to its constitution as a court, without which it could not possibly proceed with due effect. (*r*) I shall, therefore, overrule the objection of this witness; and order him to testify as required by the interrogatories.

In this case, the examination has not been attempted to be taken

(*n*) *Ashton v. Ashton*, 1 Vern. 165.—*Earl of Salisbury v. Cecil*, 1 Cox. 277; *Brace v. Ormond*, 1 Meriv. 409; *Freeman v. Fairlie*, 3 Meriv. 43; *Bolton v. Corporation of Liverpool*, 6 Cond. Chan. Rep. 513.—(*p*) 1798, ch. 84.—(*q*) *Hall v. Wirt*, 1806, per Kilty, Chancellor, M. S.—(*r*) *Amey v. Long*, 9 East. 484; *Earl of Salisbury v. Cecil*, 1 Cox, 277; *The Princess of Wales v. The Earl of Liverpool*, 1 Swan, 114; *Walburn v. Ingilhy*, 6 Cond. Chan. Rep. 508; *Bolton v. Corporation of Liverpool*, 6 Cond. Chan. Rep. 513; 3 Blac. Com. 382; 1 Harr. Prac. Chan. 450, 474; *Ringgold v. Jones*, 1 Bland, 90, note.

under a regular commission. But the mode of proceeding authorized by the order of the 21st of February, 1829, under which it was proposed to act, amounts substantially to a commission. That order authorized an examination before the commissioners appointed for Baltimore county; or any justice of the peace. The commissioners having been regularly appointed according to the act of assembly; (s) must, therefore, for this purpose, be considered as much the ministerial officers of the court, as if they had been nominated as commissioners in a commission specially directed to them in the ancient form.

In regard to the authority given by the order of the 21st of February, 1829, to take the depositions of witnesses before a justice of the peace, I am aware that there has been some doubt and difference of opinion as to the mode of requiring a witness to attend and testify in such cases; but nevertheless a witness has been compelled to attend before a justice of the peace and to have his deposition taken in a case depending in this court, under an order giving the justice authority thus to act as a commissioner. (t) Of late years there have been a great multitude of instances of such orders; and the convenience and economy of taking testimony in that mode has been felt to a great extent. It has, in my time, given rise to no complaint; and it has been sanctioned and approved by a wide range of experience. (u) I therefore feel myself authorized to place it upon a footing, in all respects, with the mode of taking testimony under a regular commission. And, consequently, whether the order, under which this testimony is proposed to be taken, be considered as amounting to, or in fact as a commission directed to the officers of the court; or as analogous to an examination before the auditor, under a decree or order to account; or as being nothing more than an order authorizing a justice of the peace to take testimony, I shall sanction, aid, and protect the proceedings under them, in like manner as if the authority had been conferred by a regular commission. (w) A late act of assembly affirms the power of this court to enforce the attendance of witnesses before commissioners, or the auditor; and gives a new and additional mode of compelling the witness to attend, (x) which, in

(s) 1826, ch. 222; 1829, ch. 159; Park. His. Co. Chan. 361.—(t) *Onion v. McComas*, ante 83; *Purvance v. Ogden*, Chancery Proceedings, 1804, fol. 49.—(u) *Townshend v. Duncan*, ante 81.—(w) *Wardel v. Dent*. 1 Dick, 334; *Hennegal v. Evance*, 12 Ves. 201, *Bradshaw v. Bradshaw*, 5 Cond. Chan. Rep. 122; *Bryson v. Petty*, 1 Bland, 182, note; *Forum Rom.* 118; 1 Harr. Prac. Chan. 447.—(x) 1824, ch. 133.

some respects, is not so clear, or so energetic as the ancient course of proceeding.

Whereupon it is *Ordered*, that the time allowed for taking testimony under the order of the 21st of February last, be and the same is hereby enlarged; provided, that the testimony so taken be returned and filed in the chancery office, on or before the 19th instant. And it is further *Ordered*, that the said objection of the said witness; and also those of the defendant *John Diffenderffer*, be and the same are hereby overruled; and the said witnesses are hereby required to answer forthwith and fully to the said interrogatories propounded to them, or either of them.

Under this order the witnesses were again called before the commissioners, and answered the interrogatories. And extracts from the books of the Mechanics' Bank, of the account of the defendant *John Diffenderffer*, were produced as required; all which were returned by the commissioners on the 10th of June, 1829.

7th October, 1829.—BLAND, Chancellor.—This case standing ready for hearing, on the exceptions to the auditor's report, and for final hearing on the decree to account, the solicitors of the parties were fully heard, and the proceedings read and considered.

I take it to have been finally settled by the judgment of the court, in the case of *Rogers v. Merryman*, to which the widow and the four daughters of the late *Charles Rogers*, were all parties; first, that the debts of the testator had been all properly and correctly paid by the trustee *Vincent*, and that a share of the surplus left, after their payment, having been ordered to be paid to *Catherine Diffenderffer*, who had been a party to that suit, before her marriage, is conclusive upon her, and those claiming under her; because, so long as those orders of the 12th of September, and 15th of December, 1820, remain in full force, and they are not now revisable, she, or any one claiming under her, cannot be permitted, in any way, to question the correctness of the manner in which the debts of *Charles Rogers*, deceased, were paid, which had been so distinctly noticed, considered, and confirmed by those judgments of the court. And in the next place, that it has been finally determined by the judgment of this court, as indicated by the orders of the 25th of March, 1815; the 8th of July, 1816, and the 18th of October, 1819, that this defendant, *John Diffenderffer*,

was to be considered thenceforward, as a trustee charged with the execution of the will of *Charles Rogers*, deceased ; and that he had succeeded to that trust, under the authority of this court, immediately after the resignation of the late *Samuel Vincent*, on the 23d of November, 1814.

These positions, which have been established in that case, appear to me to furnish a very satisfactory answer to the claim of the representatives of *Catharine Diffenderffer* deceased, to be substituted for and allowed to take the place of the creditors of *Charles Rogers* deceased, on the ground of their having been improperly paid with their funds ; and upon that ground to have certain sums withheld for their use from the distribution now about to be made ; and also to the objection, that *John Diffenderffer* is here claiming only as the natural guardian of his own children and in opposition to the plaintiffs ; since those proceedings shew, that he stands here as a trustee, so constituted by the authority of this court, for the benefit of all the devisees under the will of *Charles Rogers* deceased.

But, passing over all the proceedings and final adjudications in the case of *Rogers v. Merryman*, let us return to the decree, in this case of the 7th April, 1828, by which the defendant *John Diffenderffer* has been called upon to account for the rents and profits for the whole time the property has been, or may remain in his possession. The statements reported by the auditor, and the exceptions of the parties present two distinct subjects for consideration ; *first*, the claims and pretensions of the representatives of the late *Catharine* ; and *second*, the liabilities of and allowances to this defendant *John Diffenderffer*.

It has been urged, that the debts of the late *Charles Rogers* were paid, contrary to the directions of his will, by the trustee *Vincent*, out of rents and profits which ought to have gone to the late *Catharine* ; and, consequently, that she or her representatives, to the extent of the rents and profits to which she was entitled, and which had been so misapplied, ought now to be allowed to take the place of those creditors as against these funds in the hands of this trustee, and which are now about to be distributed.

This stand is taken upon the ground of substitution ; and it can only be maintained by means of those principles by which a surety, or one who has been placed in the condition of a surety is allowed to take the place of the creditor against the principal debtor ; or by the help of those principles by which securities or assets are mar-

shall so as to satisfy all, or to leave the loss to fall where it must rest according to the positive rules of law; or by the aid of the general principles of equity arising out of some fraud or injustice practised, or participated in by the plaintiffs, or those under whom they claim.

It is a well settled general rule, that no one can be allowed to intrude himself upon another as his surety; and therefore if a man voluntarily pays the debt of another, without any agreement to that effect with the debtor, he cannot take the place of the creditor, or in any way recover the money so paid of the debtor; because the law does not permit one man thus, officiously, and without solicitation, to intermeddle with the affairs of another. (*y*) The only exception to this general rule is, where, on a bill of exchange being dishonored, a third person, not a party to it, may pay it for the honor of the drawer, or any of the endorsers. The reason of allowing this exception is, that it induces the friends of the drawer or endorsers to render them this service; and by that means preserves the honor of commerce, and the credit of the trader. (*z*) But where one, by express contract, becomes bound as a surety for the payment of the debt of another, or as an insurer against loss, then if the surety or insurer pays the whole debt, or reimburses the loser he thereby intitles himself to demand a full assignment or subrogation of all the securities of the creditor or insured; and has a right, in all respects, to be substituted for the creditor or insured, so as to enable him to obtain re-imbursement from his principal. (*a*)

This general right of a surety has, to a certain extent, been affirmed by an act of assembly, (*b*) and this court has so entirely approved of the doctrine as to allow a surety, who had paid the whole purchase money, to have the benefit of the equitable lien of the vendor; (*c*) and also to allow a surety in a custom-house bond,

(*y*) *Stokes v. Lewis*, 1 T. R. 20.—(*z*) *Chitty on Bills*, 164.—(*a*) *Randal v. Cockran*, 1 Ves. 98; *Ex parte, Rushforth*, 10 Ves. 414; *Pothier Obli.* p. 2, c. 6, art. 4; *Just. Inst. by Cooper*, 612.—(*b*) 1763, ch. 23, s. 8.

(*c*.) *MELUY v. COOPER*.—This bill was filed on the 7th of December, 1803; it states that a mill, &c. the property of James Tilghman, had been sold under a decree of this court, by Hugh Sherwood, as trustee; that James Cooper became the purchaser, who agreed to receive the plaintiff, Meluy, as a joint purchaser with him of the one half; each to pay one half of the purchase money; that Cooper took possession and died, without having paid any part of the purchase money; that the whole purchase money had been since paid by the plaintiff, but no deed had been obtained from the trustee, Sherwood; and that the plaintiff has a lien on Cooper's half for the purchase money, which he, the plaintiff, became bound as surety to pay,

who had paid the whole debt, to take the place of the government; and thus secure to himself the high, and overruling preference to

and had in fact paid. Prayer, that the mill, &c. might be sold to reimburse the plaintiff, &c.

On the 12th of February, 1804, the infant heirs of James Cooper answered by their guardian *ad litem*: and the trustee, Sherwood, also put in his answer, by which they admitted the truth of the allegations of the bill. Upon which the case was submitted; and on the 13th of February, 1804, a decree was passed that the property be sold, &c. After which the infant defendants, by William Atkinson, their guardian, petitioned that the decree might be opened, and that they might have leave to amend their answer.

1st March, 1804.—HANSON, *Chancellor*.—Not even an affidavit of the truth of the matters stated in, or annexed to the petition. The Chancellor, therefore, cannot at present comply with the prayer of the petition.

On the 2d of April, 1804, a similar petition, with an affidavit of the truth annexed, was filed; and the plaintiff, Meluy, afterwards filed a counter petition, upon which the case was again submitted.

1st May, 1804.—HANSON, *Chancellor*.—The Chancellor has considered the said petitions. The former, although intended to prevent the execution of a decree, is neither an application for rehearing a cause, nor a bill of review. It is a request that a decree may be opened, and that another answer may be admitted, and fresh proceedings be had. In fact it was an application to set aside a decree, regularly passed on the bill, answers, and proof, without suggesting any error in judgment, or discovery of facts; and that, too, is expected to be done without hearing the other party or calling on him to answer. A similar application the Chancellor does not recollect ever before to have received or heard of. If it should succeed, the precedent thereby established, might render decrees of little value indeed; as a defendant, against whom a decree should be passed, might obtain an order for annulling the proceedings; or, at least, infant defendants might have that advantage.

When a decree is passed, the parties are no longer in court. Suppose the Chancellor to pass an order for opening the decree, as is prayed, what are to be the subsequent proceedings? It may be said, the Chancellor is to act according to his discretion, to prescribe the time for putting in an answer by another guardian, &c. &c. But under what law, usage, or practice, should he act? On a bill of review, permitted to be filed, or an order for rehearing, the practice is established. But the present application, as has already been observed, is neither a bill of review nor a petition for rehearing. In a word, it appears wholly unprecedented, as well as improper.

Mr. Meluy, however, hearing of the application, has filed a petition against it. Perhaps this petition may be considered as a voluntary answer to the petition of Mr. and Miss Cooper by Mr. Atkinson, calling himself their guardian. Mr. Meluy has, in his petition, made a proposition which appears reasonable, viz. to have an account stated by the auditor.

And it is, therefore, adjudged and ordered, that the auditor of this court, on the 15th day of June next, proceed to state an account between the deceased, father of the petitioners, Thomas and Ann Cooper; provided the said Atkinson shall come before the auditor for that purpose; and that the said trustee, appointed to sell the said property, shall not proceed to a sale until further order.

The Chancellor thinks proper to declare, that he passes this order merely because the said Meluy has, by his petition, offered to have the sale postponed, and to have an

which such a creditor is entitled. (*d*) These principles, in regard to those who stand properly in the relation to each other of principal debtor and surety, have been extended, for the benefit of an executor or administrator, who may have been induced through mistake, to pay debts of the deceased beyond the amount of the assets which came to his hands; in which case he has always been allowed, in this court, as in England, to take the place of the creditors, and obtain reimbursement out of the real assets of the deceased, so far as they were liable; or if the debt so overpaid was on a judgment against the deceased, operating as a subsisting lien upon his realty, the executor or administrator is permitted to take the place of such judgment creditor, and to have a preference in the distribution of the real assets over creditors of an inferior grade. (*e*)

The doctrine of substitution embraces only those cases where there is a principal debtor and a surety by express or implied contract; or where, for the benefit of commerce, a man is allowed officiously to place himself in the condition of a surety; or where he has by mistake, as in the case of an executor, made payment as if he had stood in that situation. Now before any of the principles, upon this subject, can be brought to bear upon the case under consideration, it must appear, that the plaintiff *Araminta*, or those under whom she claims were the principal debtors; or that the trustee *Vincent* was the principal; and that *Catharine*, or those claiming under her, were their sureties; and that those claiming under *Catharine* are now here asking to be reimbursed, as such, out of the funds of their principal now in the hands of the court.

But the assumption of any such statement would be in direct opposition to all the proofs in the case. *Vincent* was a trustee appointed by this court for the benefit of all concerned in the estate of the late *Charles Rogers*; and if he misapplied the rents and pro-

account stated. If the parties shall choose to come before the auditor, before the said day, to have the said account stated, the auditor may proceed accordingly; or if the said parties, by writing to be here filed, shall agree to the appointment of any person or persons more convenient to them than the auditor, an account by the said person or persons stated, will be received by the Chancellor as an account stated by the auditor; provided the said person or persons proceed on or before the 15th of June next.

On the 16th of June, 1804, the parties not having appeared before the auditor, the foregoing order was annulled, and the trustee ordered to sell, &c.

(*d.*) *Mickle v. Taylor*, 1806, per KILTY, Chancellor, M. S. Theob. Prin. and Sur. 259.—(*e.*) *Robinson v. Tonge*, 3 P. Will. 400. Theob. Prin. and Sur. 233. *Ex parte*, Street, 1 Bland, 532, note.

fits which came to his hands, he alone is responsible. If this court were to make good to *Catharine's* representatives any amount of the rents and profits which had been misapplied by *Vincent* to their prejudice, out of the proportion of the funds now about to be distributed, to which the plaintiff *Araminta* is entitled, it would be, in effect, to treat her as the principal debtor, for whose benefit, among others, *Vincent* was not merely a trustee, subject only to the order of this court; but, who was, in fact, her own proper agent; or it would be to consider *Araminta* as the surety of the trustee *Vincent*. But there is nothing in the case to warrant the placing of *Araminta* in any such condition of responsibility; and therefore the representatives of the late *Catharine* cannot sustain themselves on the stand they have taken by any principles derivable from the case of a principal debtor and surety.

But the representatives of the late *Catherine*, insist on having the securities, or these assets, now about to be distributed, so marshalled as to reimburse them to the amount of their share of the rents and profits which had been misapplied by the former trustee, *Vincent*.

The marshalling of securities is only made where the debt is so secured as to give to the creditor the means of obtaining payment out of two funds, and others can reach only one of them. In such case the court will compel the creditor who holds the more comprehensive security to obtain payment, as far as practicable, out of the fund which the other creditors cannot reach; so as to leave the other fund to be distributed among the creditors holding more limited securities. (*f*) But there is no sort of analogy between the case of creditors, whose securities may be thus marshalled, for the benefit of all, and without injury to any, and the case now under consideration. The plaintiff *Araminta*, and the representatives of the late *Catherine*, stand precisely in the same situation; not as creditors seeking payment, by way of preference, or otherwise, from the assets of a debtor; but claiming the distribution of a fund to which they are alike entitled.

Marshalling of assets respects two different funds, and two different sets of parties, where one set can resort to either fund, and the other only to one. As where there are real and personal assets, and judgment and simple contract creditors; the real assets will be applied to the satisfaction of the judgment creditors; so as to leave

the personalty to satisfy the debts due by simple contract. (g) But here there is but one fund and one set of claimants, who all deduce their titles from the same fountain. There is, then, nothing to be drawn from the principles of equity in relation to the marshalling of securities or of assets which can, in any manner, aid the representatives of the late *Catherine*, in maintaining the stand they have taken.

It has, however, been argued, that the amount misapplied by the trustee *Vincent*, came to the use of those under whom *Araminta* claims; And, therefore, that it ought to be deducted from the share now about to be awarded to her.

If it had been shewn, that the trustee *Vincent* had fraudulently misapplied the funds, and that *Araminta*, or those under whom she claims, had participated in the fraud; or that *Vincent* had paid money, properly belonging to the late *Catherine*, or her representatives, to *Araminta*, or those under whom she claims, who had received it, knowing it to be such, then there would have been a strong equitable ground for deducting the amount so received, for the benefit of the representatives of the late *Catherine*, from the amount now about to be awarded to *Araminta*. But there is no proof whatever of any fraud in *Vincent*, or of any participation in it by *Araminta*, or those under whom she claims; or of their having received any sums of money, knowing it to be the money of the late *Catherine*; or that it was money to which they were not justly entitled.

Upon the whole, therefore, I am of opinion, that no deduction whatever can be made from the share to which the plaintiff *Araminta* is entitled; because, of any misapplication of the rents and profits in payment of the debts of the late *Charles Rogers*, or on account of any other misapplication of them by the former trustee *Samuel Vincent*.

Having thus disposed of the claims of the representatives of *Catherine Diffenderffer*, deceased, it only remains to determine the extent of the liabilities and allowances of the defendant *John Diffenderffer*.

It has been urged, on his behalf, that he cannot be considered as a trustee; because he took possession of this property in no other character, than as the natural guardian of his children. Admitting that he did so. He himself states, that he held their

right under the will of their grandfather; and so far, according to his own shewing, he took possession of this property in the character of a trustee; and as such he undertook, at his peril, with the title deeds of his children before him, to claim and hold, on their behalf, a much larger interest than that which belonged to them. He had thus confessedly assumed no higher character than that of trustee for those who had the right; and now, that it clearly appears, and has been determined by a decree of this court, that the whole right was not in his children, he certainly cannot be allowed to assume a new character, and to retain rents and profits which he does not pretend to have received as his own; but for the use of others, who, it has been determined, have no right to them, and who cannot be allowed to receive them, or be held accountable for them. The decree of the 7th of April, 1828, is, however, conclusive upon this subject. Under that decree he has been called upon to account for the benefit of those, the extent of whose interests have been determined by it.

It has been contended on behalf of *John Diffenderffer*, that he is not chargeable with interest at all; while on the other hand, compound interest is claimed of him.

Legal interest is the measure of damages which the law allows in all cases for the detention of money; which the holder is made to pay where he is in any default in not paying, or applying the money in his hands as he was bound to do. (*h*) The general rule is, however, that interest is not given upon interest; and therefore, on a bill for an account, for the recovery of a legacy, or the like, where interest is allowed, it is computed by the auditor from the time the money became due up to the time of stating the account, with interest on the principal sum only from that time until paid. By which mode of computation and decree compound interest is excluded; and this appears to be the rule in Virginia. (*i*) It has long been the established course of this court, according to the rule laid down by the Court of Appeals, in taking an account of rents and profits to charge the party with interest thereon from the respective times they were received. (*j*)

In this case, one of the accounts of the rents and profits has been stated with annual rests, at the instances of the plaintiffs: and the statement has not been objected to. It is more favourable

(*h*) 2 Fonb. 423.—(*i*) *Hammond v. Hammond*, post.; *Sheppard v. Starke*, 3 Mun. 41.—(*j*) *Davis v. Walsh*, 2 H. & J. 344

to the defendant *John Diffenderffer* than to charge him with interest, according to the rule of the court, from the time each sum was received; and therefore, the computation of interest from the rests will in this case be approved.

But it is objected, that interest should not be charged on the interest computed as a portion of the balances at each of those rests.

From all that has been said upon this subject, I take it, that interest upon interest, or compound interest may be charged in three kinds of cases; *first*, where with the knowledge and permission of the debtor his whole debt, principal and interest, has been paid by a third person or his surety; because, as to such third person or surety the interest is the same as the principal sum lent. (*k*) *Second*, where a trustee or holder of money has been directed, or undertakes to invest the sum placed in his hands in a way to make it productive, and fails or refuses to do so, he shall be charged with compound interest. As where a trustee was ordered to invest a certain sum of money, then in his hands, in bank-stock; and that he should, in like manner, invest the dividends arising from such investment; on his failing and refusing to do so he may be charged with interest upon the sums so directed to be invested, and interest upon that interest until the whole sum shall be invested or brought into court. (*l*) And *third*, where a trustee has received rents and profits which he should have applied so as to be productive, or towards the maintenance of devisees; but failing or refusing to do so, retains and uses the money as his own, in a manner to derive profit from it; there also he shall be charged with the whole profits he has made from the use of it; or on his failing clearly to shew what those profits were, it will be presumed, that the annual amount of interest had yielded him interest; and he must be charged with interest thereon accordingly; considering each year's interest as an addition to the capital sum lent or withheld. (*m*)

The equity of the last rule is founded upon the fact of the beneficial application of the money to the trustee's own use in violation of his trust, and to the prejudice of the *cestui que trust*; and therefore, it must appear, that the nature of the trust required the trustee to make the funds which came to his hands productive as soon, and to as large an amount as practicable in the mode prescribed, or in

(*k*) 2 Fonb. 438.—(*l*) *Sammes v. Rickman*, 2 Ves. jun. 37; *Ringgold v. Ringgold*, 1 H. & G. 12; *Latimer v. Hanson*, 1 Bland, 51.—(*m*) Co. Litt. 172, a.

some other reasonable way, at his discretion; or that he was required to apply them to the maintenance or education of the *cestui que trust*; and it must also appear, that he not only failed to do so, but applied the money to his own use, or put it to hazard in a manner in which he had, or might have derived a profit from it. That the trustee was required to invest, or make a beneficial application of the money may be shewn by the terms in which the trust was created. But, whether he has applied it to his own use or not, must be shewn by proof. Whether the pecuniary ability of the trustee was such as to enable him to pay at any time, when called on, is a matter of no consequence, as regards the question of interest. The making of a deposit of the money at a bank as his own; or making purchases with it; or using it in the course of his trade, has been deemed sufficient evidence of his deriving such a profit from it as to authorize the court to charge him with interest upon each annual amount of interest. (n)

In the case under consideration, it very satisfactorily appears to have been the duty of the defendant *John Diffenderffer* to have applied the rents and profits, received by him, for the benefit of all the devisees of the late *Charles Rogers*; and that, instead of doing so, he deposited them, as received, in bank as his own, drew them out, made purchases, and used them for his own use and benefit exclusively. What advantages he derived from those rents and profits, thus mingled with his own money, from the time of their being deposited in bank, has not been shewn; but such a management must have been very beneficial to himself, and greatly injurious to the devisees. Such a course of conduct by any one, standing as this defendant *John Diffenderffer* did, bound to make the funds received by him productive, or constantly useful to those entitled to them, cannot be tolerated by this court. I am therefore, of opinion, that he has been correctly charged with interest on the whole amount including principal and interest found to be in his hands at each rest.

The next inquiry is as to the allowances which should be made to the defendant *John Diffenderffer*. In England, trustees are never allowed anything as a compensation for their trouble; (o) here it is otherwise; executors, and all persons, standing in the

(n) *Newton v. Bennet*, 1 Bro. C. C. 359; *Rocke v. Hart*, 11 Ves. 59; *Raphael v. Boehm*, 11 Ves. 92, S. C. 13, Ves. 408 & 591; *Tebbs v. Carpenter*, 1 Mad. Rep. 290; *Attorney-General v. Solly*, 2 Cond. Chan. Rep. 528; *Ringgold v. Ringgold*, 1 H. & G. 12.—(o) *Sykes v. Hastings*, 11 Ves. 363.

situation of trustees, charged with the care and management of an estate, are allowed a compensation for their trouble, in the form of a commission, of so much per cent. upon the amount collected and disbursed by them. In many cases, the commission is limited by positive law; (*p*) but in all cases its allowance, within the prescribed limits, seems to be considered as an exercise of a discretionary power which rests so exclusively with the court of original jurisdiction, that it cannot be revised or controlled in any way whatever. (*q*)

The Court of Chancery is peculiarly and absolutely civil in its institution, and in all its modes of procedure. It is confined to cases of distributive and commutative justice alone, and has no jurisdiction whatever over torts or crimes. It dispenses no favours, nor does it administer vindictive justice in any form. (*r*) The principle upon which it awards simple or compound interest to a party whose money has been unjustly withheld, or misapplied, is that of commutative justice, considering the interest as a full compensation for the injustice done, and as the proper, or only remuneration which the court can award in such cases; (*s*) and, consequently, to lessen or altogether to withhold from a trustee any allowance to which he may be justly entitled, upon the same ground on which he had been charged with simple or compound interest would be, in effect, to impose upon him a fine or forfeiture upon the principles of vindictive justice; and to punish him for an offence which the court itself had declared would be sufficiently expiated by the payment of simple or compound interest. The duties performed by a trustee, may have been so light, or may have been performed in so negligent or unskilful a manner as, on that ground, to entitle him to small, or perhaps to no commissions at all; but to whatever commissions he may be entitled, they certainly should not be lessened, or altogether withheld, upon the ground of his having done, or omitted to do anything for which the payment of simple or compound interest had been awarded as a compensation; because every single transaction must be considered by itself. (*t*) Recollecting, however, that a trustee cannot be allowed to retain or

(*p*) 1798, ch. 101, sub ch. 10, s. 2.—(*q*) *Nicholls v. Hodges*, 1 Peters, 562.—(*r*) 1 Fonb. 2; *Peake v. Highfield*, 1 Russ. 560; *Nash v. Nash*, 4 Ecclesi. Rep. 357; *Singery v. Attorney-General*, 2 H. & J. 497; *Fornhill v. Murray*, 1 Bland, 484.—(*s*) 1 Fonb. 3; 2 Fonb. 423.—(*t*) *Sammes v. Rickman*, 2 Ves. jun. 37; *Adye v. Feuilliteau*, 3 Swan. 87, note.

receive anything, as a compensation, until he has paid all he owes to the plaintiffs, or *cestui que trust*.

It is clear that this trustee, *John Diffenderffer*, is entitled to some commission, and as his claim to such compensation cannot be affected by a reference to those circumstances, upon which he has been charged with compound interest, it follows, that the amount of his commissions can only be determined by a consideration of all other circumstances connected with the discharge of his duty as trustee. It appears from the proceedings, that he has had, in all respects, as complicated and troublesome an estate to deal with, as ever was committed to the management of a trustee of any denomination. His receipts have been very numerous, many of them small; and the collections and disbursements, it is evident, must have been attended with much trouble; and, therefore, upon every principle of analogy, apart from considering him as the successor of the trustee *Vincent*, to whom ten per cent. had been allowed, I am of opinion, that ten per cent. commission is a reasonable compensation, and shall therefore ratify the statement of the auditor, which makes that allowance.

Whereupon, it is *Decreed*, that the statement D, making a part of the auditor's report, filed on the 10th of November, 1828, be and the same is hereby ratified and confirmed; and all other statements at the same time reported by the auditor, together with his report of the 26th of March last, be and the same are hereby rejected; and all the exceptions of the parties at variance with the statement D, are hereby overruled.

And it is further *Decreed*, that the defendant *John Diffenderffer*, pay unto the plaintiffs *William S. Winder* and *Araminta*, his wife, or bring into this court to be paid to them, the sum of \$13,060 58, with legal interest thereon, from the 8th day of November, 1828, until paid or brought into court.

And it is further *Decreed*, that the defendant *John Diffenderffer*, pay unto the defendant *Amelia Diffenderffer*, or bring into this court to be paid to her, the sum of \$8,707 05, with legal interest thereon, from the 8th day of November, 1828, until paid or brought in.

And it is further *Decreed*, that the defendant *John Diffenderffer*, pay unto the defendant *Michael Diffenderffer*, or bring into this court to be paid to him, the sum of \$8,707 05, with legal interest thereon, from the 8th day of November, 1828, until paid or brought in.

And it is further *Decreed*, that the defendant *John Diffenderffer*, pay unto the defendant *Charles R. Diffenderffer*, or bring into this court to be paid to him, the sum of \$8,707 05, with legal interest thereon, from the 8th day of November, 1828, until paid or brought in.

And it is further *Decreed*, that the defendant *John Diffenderffer*, pay unto the plaintiffs, and to each one of the other parties, their costs in this suit arising under the said decree to account to be taxed by the Register.

See the report of this case as disposed of by the Court of Appeals, 3 G. & J. 311.

CAMPBELL'S CASE.

Where an estate has been devised to be sold to pay debts, the trustee who has accepted the trust, may be ordered to proceed accordingly, and to sell, as directed by the will, real estate lying out of this state.—Trustees, on failing to give bond as required, may be removed, and another trustee appointed.

On petition and affidavit a writ *de lunatico inquirendo* may be issued.—It should be directed to the county in which the person alleged to be insane resides; but if he be not within the state, it should be directed to the county in which he last resided; and in some cases, his appearance before the inquest may be dispensed with.

In a creditor's suit the case may be submitted, to obtain a decree for a sale, without having been regularly set down for hearing.—Formerly the estate of a lunatic might be saved as far as practicable; and as regarded infant heirs and devisees, the parol might demur; but now, on the answer of a lunatic by his committee, or an infant by his guardian *ad litem*, in a creditor's suit, a sale of the realty may be at once decreed to pay debts.—All devises to the prejudice of creditors are declared to be void; but if not materially so, the creditors can only take the estate devised for their satisfaction.

In England, private acts of parliament have only been passed in cases where the parties could be relieved in no other way.—Such acts are considered only as conveyances, binding on those alone who are parties; and if tainted with fraud, may be set aside.—Although the facts set forth in a bill of attainder cannot be questioned, yet the truth of a fact stated in a private act of parliament cannot be assumed to the prejudice of any private right.—Here, as well as in England, apart from any constitutional objection, a statute, because of its being inexplicable, contradictory, or altogether absurd, may be declared void.—Here, as the sovereignty belongs to the people only, our government is limited, as well by its nature as by special constitutional restrictions.—The general assembly can pass no law impairing the obligation of contracts, or injuriously affecting the right of private property; or exercise any authority whatever beyond its own sphere as a legislature.—Private acts of assembly operate here like conveyances, binding only on the parties, and are valid only in so far as they do not conflict with the con-

stitution.—A marriage between then living parties, although held to be a contract, may be annulled.—An act giving authority to mortgage the real estate of a deceased person for the payment of his debts, may bind his heirs and devisees who applied for it, but it cannot affect the rights of his creditors.

Although bond and simple contract creditors, as such, have no lien on the real estate of their debtor, yet no alienation of the heir or devisee to their prejudice, after a creditor's suit has been commenced, can be sustained.—Several suits, the objects of which are to have the same estate applied in satisfaction of the same set of creditors, may be consolidated.

THIS bill was filed on the 22d of January, 1824, by *Edward Campbell, Randolph Campbell, James Cunningham*, and *Catherine* his wife, against *John McHenry*. It states, that *William Campbell*, the father of these plaintiffs, *Edward, Randolph, and Catherine*, being seized and possessed of a large real and personal estate, on the 8th of September, 1821, made his will, by which he gave the whole of his property to the plaintiff, *Edward*, and the defendant, in trust, as follows :

‘All my lands in Baltimore county to be sold for the payment of my debts ; and if the proceeds thereof, together with the debts due me should not be sufficient to discharge the same, then my square in Fredericktown, my Tontine shares, and my ten Potomac shares to be sold for that purpose, or so much thereof as may be necessary : and if there should still be a deficiency, then as much of my property in the city of Washington as may be necessary to supply that deficiency. My debts being paid, then the residue of my property to be held for the use of my children, *viz. Catherine Cunningham, Charles Campbell, Randolph Campbell, and Edward Campbell*, in the manner and proportions following.’ The testator then goes on to specify the portions which each one was to have ; and declares, that it shall be held in trust for the use of each one during his or her life, and afterwards to be equally divided among his or her children. And then the testator appoints the plaintiff *Edward*, and the defendant, to be his executors.

The bill further states, that *William Campbell* soon after having thus made his will died, leaving the four children therein named, one of whom, *Charles*, was then and still continued to be *non compos mentis* ; that the executors qualified as such, and undertook to act as trustees according to the trusts reposed in them by the will ; that the testator, at the time of his death, was largely indebted to sundry persons, which debts yet remain unpaid ; that the plaintiff *Edward*, as trustee, sold one part of the lands in Baltimore county to *Warner Warfield*, and another part of the same tract to *James*

Hood, and had received a payment, in part, from *Warfield*, to whom he had delivered possession; but that *Warfield* had refused to pay any more, and *Hood* had refused to pay any thing, although they were both of them able and willing to comply with the terms of their bargain, until they could obtain a good title by a joint conveyance from the trustees, the plaintiff *Edward* and the defendant; that some of the creditors of the testator had sued and obtained judgments against his executors, and others were pressing for payment; and that the testator's personal estate was wholly insufficient to pay his debts. Whereupon the plaintiffs prayed that the sales made by the trustee *Edward*, might be affirmed, and that the defendant might be ordered to join in making sales, without delay, to satisfy the claims against the estate, so as to relieve so much of it as had been devised to their use from that incumbrance.

The defendant put in his answer, in which he admitted that he had been appointed a trustee as stated, and that the plaintiff *Edward*, had contracted for the sale of the lands in Baltimore county as set forth; but that the defendant had heard, that he had not applied so much of the purchase money as he had received from *Warfield* to the satisfaction of his testator's debts; and that the proposed sale to *Hood*, was for less than what the defendant conceived to be a fair price, and was also of such a part of the land as would make the residue very unsaleable; and, therefore, this defendant had withheld his assent to the proposed sales.

7th October, 1825.—BLAND, Chancellor.—This case standing ready for hearing, and having been submitted, the proceedings were read and considered.

Whereupon it is *Decreed*, that for the payment of the debts, and the execution of the trusts as specified in the last will and testament of the said late *William Campbell*, the said *John McHenry* and *Edward Campbell*, the trustees named and appointed by the said testator, forthwith proceed to make sale of the property and estate of the testator, according to the directions of his last will and testament, in such manner, and upon such terms as they may deem most advantageous to all parties concerned therein. And if the sale of all the lands of the testator lying in Baltimore county should not produce a sufficient amount, together with the debts due to him, to satisfy all the debts due by the testator, that then the trustees, for that purpose, forthwith proceed to make sale of the square in Fredericktown, the Tontine shares, and the ten Potomac shares, as specified in the testament of the deceased, or so much thereof as

may be necessary; and if there should still be a deficiency, that then as much of the testator's property lying in the city of Washington be sold as may be necessary to supply the deficiency. And the money arising from the sales shall be applied by the trustees to the payment of the debts due by the testator, and according to the uses and trusts specified in his last will and testament. And the sales of the testator's estate, which were made unto *Warner Warfield* and unto *James Hood*, as set forth in the proceedings, are hereby approved, and each of the said contracts is hereby directed to be executed and completed upon the terms expressed in the proceedings. And it is further *Ordered*, that *Edward Campbell*, one of the said trustees, shall, as soon as conveniently may be, return to this court a full and particular account of his proceedings relative to the sales stated to have been made by him, and of the amount of the purchase money received by him, and whether he has the same now in hand; and if not, how and in what manner he has disposed of or distributed the same in execution of the trusts reposed in him, with an affidavit of the truth thereof.

The plaintiffs *Cunningham* and wife, by their petition, founded on the act of assembly in regard to such matters, (a) represented, that the estate of the late *William Campbell*, which by the decree of the 7th of October, had been ordered to be sold by these testamentary trustees, was very large and valuable; and that it was necessary for the safety of those interested, that the trustees should give bond with surety for the faithful performance of the trust; whereupon they prayed, that the trustees might be ordered to give bond, &c.

3d July, 1826.—BLAND, *Chancellor*.—*Ordered*, that the trustees *Edward Campbell* and *John McHenry*, on or before the twenty-first day of August next, execute and file with the register, their bond to the state in the penalty of \$100,000, with surety or sureties to be approved by the Chancellor, for the due execution of the trust reposed in them, or shew good cause to the contrary; provided, that a copy of this order, together with a copy of the foregoing petition be served on them, on or before the twenty-fourth instant.

A copy having been served as required, and no cause having been shewn, the matter was again submitted to the court.

30th September, 1826.—BLAND, Chancellor.—It appearing that the order of the third of July last had been served, and no cause having been shewn or security given as required,—and it thus appearing to be necessary for the safety of those interested in the execution of the trusts mentioned in the last will and testament of the late *William Campbell*, that the trustees should give bond with surety for the due execution of the same,—It is therefore *Ordered*, that the trustees, *John McHenry* and *Edward Campbell*, be and they are hereby removed and displaced so soon as the trustee hereinafter named, shall have given bond as required. And it is further *Ordered*, that *John I. Donaldson* be and he is hereby appointed trustee under the last will and testament of the late *William Campbell*, in the place of *John McHenry* and *Edward Campbell*; but, before the said *Donaldson* shall act as such, he shall give bond with surety to be approved by the Chancellor for the due execution of the said trust in the penalty of \$100,000, which bond shall be made payable to the state, and filed by the register and recorded as required, by the act in such case made and provided. (b)

After the trustee, appointed by this order, had given bond as required, he brought the case again before the court, for the purpose of obtaining an account and possession of the estate which had been thus committed to his administration.

10th October, 1826.—BLAND, Chancellor.—*Ordered*, that *John McHenry* and *Edward Campbell*, the trustees who have been displaced by the order of the 30th of September last, be and they are hereby directed, on or before the 1st day of January next, to make a report to this court of all and singular the money or property which, by virtue of the trust reposed in them, by the last will and testament of the late *William Campbell*, may be now in their hands or possession, or have been in their hands or possession, or either of them; or which has been disposed of by them or either of them; with a full and particular account of all sales, receipts and disbursements, made in their joint or respective capacities of trustees. And it is further *Ordered*, that they and each of them, be and are hereby directed and required forthwith to pay and deliver over unto the said trustee *John I. Donaldson*, all money and property which they or either of them may have in their or either of their hands or possession, by virtue of the said trust. Provided, that a

copy of this order be served on the said *John McHenry*, and on the said *Edward Campbell*, on or before the 1st day of November next.

For the purpose of enabling the court to make a just and equitable distribution of the assets of the testator, among his creditors, on motion of the trustee, the case was submitted to obtain an order for giving them notice to bring in their claims, the vouchers of some of whose claims had been filed on the 22d of January, 1824, with the original bill.

24th January, 1827.—BLAND, Chancellor.—Ordered, that the creditors of *William Campbell*, late of Frederick county, deceased, file the vouchers of their claims in the chancery office, within four months from this date; and that a copy of this order be inserted once in each of three successive weeks in one of the Annapolis, Baltimore, and Fredericktown newspapers, before the 10th day of March next.

This order was published as directed; and *John Baltzell*, on the 16th of February, 1827; *E. H. Rockwell*, on the 6th of March, 1827; and *George Bowles*, on the 12th of May, 1827, filed the vouchers of their claims as creditors of the testator.

The trustee, *Donaldson*, by his several reports, stated, that he had received from the Washington Tontine company, \$1,556 27, being the amount of a dividend of \$20 75 per share, on seventy-five shares of that stock, held by the testator; upon which he was allowed a commission of \$78 74. And he further reported, that he had sold two of the lots in the city of Washington, for the sum of \$686 37, which sales were finally ratified, on the 14th of September, 1827. And he further reported, that he had received of *Benjamin Dorsey*, \$422 15, being the balance of the purchase money of the land sold to him; for which he had executed to him a deed: from *Warner Warfield*, \$800, on account of his purchase: from *Joseph Forrest*, \$102: and from Col. *Beaty*, \$198 20, on account of rent of property in the city of Washington; amounting in all to \$1,522 35; upon which he was allowed a commission of \$74 20. And he further reported, that he had received of *Warner Warfield*, for the lands sold to him, the sum of \$2,600; upon which he was allowed a commission of \$100.

The auditor reported on the 4th of August, 1827, that he had, at the instance of the trustee, made a statement of the claims of creditors against the estate of the deceased, amounting to

\$50,860 65; but, as it appeared, that some payments had been made by the former trustees, no distribution could be made until the evidence of those payments should be produced.

The plaintiffs, *Edward Campbell* and *Cunningham* and wife, by their petition, filed on the 11th of December, 1827, stated, that on the petition of the devisees and heirs of the late *William Campbell*, the General Assembly had, on the 1st of March, 1826, passed a private act authorizing the Chancellor, on the application of any person interested, and on being satisfied that it would be beneficial to the creditors and others interested in the estate, to appoint a trustee with power to mortgage the real estate of which the late *William Campbell* died seized, or any part of it, for such sums, and on such terms as he might deem most advantageous to all concerned; and that the trustee so appointed, should give bond with surety for the faithful performance of his duty. (c) And these petitioners further state, that the plaintiff *Randolph Campbell*, was then dead intestate, and without issue; that *Charles Campbell* still continued to be of unsound mind, and was then in the hospital in Philadelphia, without hope of recovery; and the petitioner *Cathe-*

(c) An act to authorize the appointment of a trustee or trustees, with powers to mortgage certain real estate, for the purposes therein mentioned.

Whereas, it is represented to this General Assembly that *William Campbell*, late of Frederick county, deceased, was, at the time of his death, seized and possessed of considerable real and personal estate, and was indebted to a very large amount; that the estate which he left is greatly more than sufficient to pay his debts, if a sale of said property could be effected on reasonable terms; but at this time, it cannot be sold without a considerable sacrifice. And, whereas, the devisees and heirs at law of the said *William Campbell* have petitioned this General Assembly for a law to authorize them, or some person for them, to raise a sufficient sum of money to pay the debts due by the said *William Campbell*, by mortgaging the real estate of which the said *Campbell* died seized. Therefore,

Be it enacted by the General Assembly of Maryland, That the Chancellor of Maryland, upon the application of any person or persons interested in the said estate, and upon being satisfied that it will be beneficial to the creditors and other persons interested in the said estate, be, and he is hereby authorized to appoint a trustee or trustees, with power and authority to mortgage the real estate of which *William Campbell*, late of Frederick county, died seized, or any part thereof, to such person or persons, and for such sum or sums, and on such terms and conditions as he, she, or they may deem most advantageous to all the persons interested as aforesaid in the estate of the said *William Campbell*. *Provided*, That the trustee or trustees, so appointed, before he, she, or they proceed to the execution of the trust, shall execute a bond to the state of Maryland, with such security as the Chancellor shall require, conditioned for the performance of said trust, and for the faithful application of the sum or sums of money which may be received from the mortgage of said estate, to the payment of the debts due by the said *William Campbell* previous to his decease.—1825, ch. 135.

rine, as the devisee, who, by the will of her father, was to take on his behalf and after him, considered this petition filed as well on his behalf as her own; that these petitioners had, in pursuance of the intention of the testator, been put into possession of the real and personal estate devised in trust for their use; and that the creditors were so pressing, that the petitioners were apprehensive that the estate in their hands might be taken from them; and that they might thus be left without the means of support. Upon which they prayed, that a trustee might be appointed as authorized by the act of Assembly, &c.

With this petition the trustee *Donaldson* filed his affidavit, in which he states, that he had advertised two public sales of the estate; and had only been able to effect a sale of the two lots in Washington as before reported by him; that he believed no sales could now be effected, except at ruinous sacrifices; and that by the statement of the auditor there were debts due to the amount of \$50,860 65, which, he understood, might have been reduced \$8,000 or \$10,000 by payments which had been made.

12th December, 1827.—BLAND, Chancellor.—Decreed, that *John I. Donaldson* be and he is hereby appointed trustee with full power and authority to mortgage the real estate of which the said *William Campbell* died seized, or any part thereof to such person or persons and for such sum or sums, and on such terms and conditions as he may deem most advantageous to all persons interested in the estate; provided, that the said trustee before he proceeds to the execution of his trust, shall give bond with surety in the penalty of fifty thousand dollars, &c.

James Cunningham and *Catherine* his wife, two of the plaintiffs in this case, by their petition to the Chancellor, set forth, that *Charles Campbell*, of Frederick county, had been for some years, and then was in a state of great mental weakness and unsoundness of mind; rendering him incapable of managing himself or his property; that he never had been married; and that the petitioner *Catherine* his sister, and *Edward Campbell* his brother, were his next of kin. Upon which it was prayed that a writ *de lunatico inquirendo* might be issued. With this petition there was filed an affidavit, made on the 15th of December, 1827, before the mayor, and certified under the seal of the city of Philadelphia, by the attending physician of the Hospital of Philadelphia stating, that *Charles Campbell* had been for several years, and then was in that

hospital in a state of insanity, and incompetent to the management of his affairs.

26th December, 1827.—BLAND, *Chancellor*.—Of the sufficiency of the evidence of insanity, on this application, there can be no doubt; and there seems to be as little room to doubt the identity of the person, particularly when this petition and affidavit are taken in connexion with the proceedings which have been had in relation to the estate of the late *William Campbell*. There is then sufficient ground upon which to award the writ as prayed.

With regard to the county to which it must be directed; it is, in general, proper, and may, in some cases, be indispensably necessary, that the person alleged to be of unsound mind should be brought before the jury who are convened by the sheriff to ascertain his intellectual condition. And for that reason the writ is almost always directed to the sheriff of the county in which the person said to be insane resides, or may at the time be placed. But if he is out of the state at the time, or it is impracticable, or, as in this instance, it would be attended with great inconvenience and injury to the afflicted person, to have him brought before the jury, his actual presence may be dispensed with, and the writ may be directed to the sheriff of the county in which he last actually resided, or in which the principal part of his estate lies. (*d*)

Therefore, in this case, let the writ *de lunatico inquirendo* issue as prayed, directed to the sheriff of Frederick county.

The writ was issued accordingly, and an inquisition was taken in the usual manner, and returned on the 8th of January, 1828, by which the jury found, that *Charles Campbell* was a lunatic on the 15th of December, 1827, and was then in the hospital at Philadelphia; and did not enjoy lucid intervals, so that he was not sufficient for the government of himself and property; that he had been in the same state of lunacy from the 19th of March, 1819; and that *Edward Campbell* and *Catherine* the wife of *James Cunningham* were his brother and sister, and nearest of kin, &c.

10th January, 1828.—BLAND, *Chancellor*.—Ordered, that the said return be and the same is hereby ratified and confirmed. And it is further Ordered, that the care, custody and charge of the person, and of the estate of the said *Charles Campbell* be and the same is hereby committed to *James Cunningham*, of Frederick

county: Provided, that before he acts as such committee he shall file with the register a bond to the state, executed by himself and a surety or sureties to be approved by the Chancellor, in the penalty of two thousand dollars conditioned for the faithful performance of the trust reposed in him by this or any future order in the premises; and to account for and deliver up the estate and property of the said *Charles Campbell* when lawfully required.

The committee appointed by this order accepted the trust and soon after gave bond accordingly, which was filed and approved. (*e*)

The trustee *Donaldson* reported, that he had sold a square in the city of Washington for the sum of \$3000, one-fourth of the purchase money to be paid in cash, and the residue in one, two and three years; which sale was finally ratified on the 4th of September, 1828. And he further reported, that he had contracted to mortgage a part of the estate of the testator, upon the terms specified in the deed then exhibited, which he submitted for the confirmation of the Chancellor.

15th June, 1830.—BLAND, Chancellor.—Ordered, that the proposed terms as specified in the deed exhibited by the trustee be approved, and that he execute a mortgage accordingly.

On the 14th of February, 1829, *Richard Harwood* of *Thomas*, and *Henry H. Harwood*, administrators of *Benjamin Harwood* deceased, for themselves and in behalf of the other creditors of the late *William Campbell*, filed their bill in this court against *Edward Campbell*, *John McHenry*, *James Cunningham* and *Catherine* his wife, *William C. Cunningham*, *James Cunningham junr.*, *Rebecca Cunningham*, *Charles E. Cunningham*, *George Cunningham*, *Charles Campbell* and *John I. Donaldson*.

This bill after setting forth, in substance, all the circumstances as herein before detailed, states, that the late *William Campbell* was, at the time of his death, indebted to the amount stated to the intestate of the plaintiffs, which debt yet remains unsatisfied; that the trustees and executors, these defendants *Edward Campbell* and *John McHenry*, made sale of large portions of the estate of

(*e*) This proceeding is not introduced here, because of its properly forming any part of this case; but because it has been referred to as an exhibit, and because it is intimately connected with this case; and may be useful in other respects.

their testator; the proceeds of which they have not applied in satisfaction of his debts; that the trustee, the defendant *Donaldson*, had not yet accounted for the sums received by him; and that the personal estate together with so much of the real estate as had been devised to be sold was wholly insufficient to pay the debts of the testator. Whereupon it was prayed, that the executors, and the several trustees might be ordered to account for the property and the several sums of money disposed of and received by them; and that so much of the real estate of the testator as had been devised to these defendants, his children and grand-children, as would be sufficient for the payment of his debts might be sold for that purpose, &c.

The defendant *Charles Campbell*, by his committee, *James Cunningham*, answered and admitted the matters as set forth, so far as they were within his own knowledge; but he insisted, that all the lands devised to be sold should be first disposed of before any other portions of the real estate should be ordered to be sold; and also, that no part of that which had been devised to him the lunatic, and which constituted his only means of support should be sold, until a full account had been taken of the funds which had passed into the hands of the trustees.

The infant defendants, children of the defendant *Catherine*, answered by their guardian *ad litem*, and admitted the circumstances as set forth in the bill; but they insisted, that the lands devised to be sold, should be first applied in satisfaction of the debts; and they also insisted, that the act authorizing the Chancellor to appoint a trustee to mortgage the estate of the testator, and the proceedings under it, having passed with the full knowledge of the plaintiffs, and without any opposition from them or any other of the testator's creditors, this court had no power to set aside and disregard that law, and the decree under it; and to order a sale of the estate as if no such proceedings had been had.

The trustee, *Donaldson*, put in his answer, in which he admitted all the matters set forth so far as he was concerned. The other defendants having been summoned, and having failed to answer, an interlocutory decree was passed against them, under the act of Assembly; (f) and a commission to take evidence was issued and returned in the usual manner.

The solicitors of the parties, on the 25th of July, 1829, filed an agreement in the following words: 'It is agreed, that this cause shall remain in its present state until September term; and unless some other agreement shall be entered into before that time, that such decree shall then be entered as may appear agreeable to the course of the court, upon the case made by the bill and answer now filed.' No other agreement having been entered into, the case was submitted, with a consent by the solicitors of the parties, except the defendant *McHenry*, that a decree, as proposed, should be passed.

31st October, 1829.—BLAND, *Chancellor*.—The agreement under which this case has been submitted, is conclusive upon all the adult parties to the suit, except the defendant *John McHenry*, who is not a party to it; but he, being in default for not answering, may on the proceedings and proofs, be considered as having waived all objections to the plaintiff's obtaining the relief asked by the bill.

In regard to the lunatic and the infant defendants, it is clear, that their interests cannot be bound by any special agreement; and, therefore, although a committee or guardian *ad litem*, of a lunatic or infant may, in a regular course of proceeding, in some cases, consent to a decree; (g) yet as to them, in this instance, the court must found its decree upon other and better ground than that of a peculiar agreement by which adult and sane persons alone are competent to bind themselves.

According to the general course of the court, all cases must be regularly set down for hearing before either party is allowed to call for a decree. But in creditors' suits the course is somewhat different. In such cases, to prevent delay, and as so much is to be done after the funds have been brought into court, and every thing may be so easily set right, by further directions, it has long been the established practice here, as well as in England, in all such cases, where the whole, or a part of the plaintiff's claim, as designated in the bill, has been distinctly established or admitted, as specified; and it is shewn or confessed, that the personal estate has been exhausted, or is insufficient, at once to pass a decree, directing the real estate to be sold, without waiting for the case to be fully prepared for a final close, or to be regularly set down for hearing. (h) And this being a creditor's suit, a decree for a sale may,

(g) *Hammond v. Hammond*, post.

(h) *Holme v. Stanley*, 8 Ves. 1.—*Lloyd v. Johnes*, 9 Ves. 65.—*Birch v. Glover*, 4 Mad. 376.

therefore, be passed before the case has been regularly set down for hearing, provided there be no other impediment to the passing of such a decree.

CHAMBERLAIN v. BROWN.—This was a creditor's bill, filed on the 24th of June, 1794, to have the lands of Robert Brown, a deceased debtor, sold to pay his debts, on the ground that his personal estate was insufficient for that purpose. The heirs, who were all infants, answered by their guardian *ad litem*, that their said father was indebted to a much greater amount than the value of his personal estate, and which debts could only be satisfied by the aid of the real estate, which they had no objection to being applied under the authority of this court, to whose care and protection, as infants, they begged leave to submit themselves. William Richmond, the administrator, by his answer, admitted that Robert Brown, late of Queen Anne county, died largely indebted to the complainants, on judgments obtained in the lifetime of the said Robert Brown, as in their said bill was alleged, &c.; and that this defendant has not assets sufficient to pay the debts of the said John Lloyd, as stated in the said bill.

20th April, 1797.—**HANSON, Chancellor.**—The Chancellor has perused these papers on submission, and finds the case not ready. There is no claim established to his satisfaction; and if there were, there is no proof of the insufficiency of the personal estate.

On the 31st of July, 1797, a settlement of an account by the administrator of the deceased with the Orphans Court, shewing a deficiency of the personal estate to pay the debts was filed, and the case was again submitted.

17th August, 1797.—**HANSON, Chancellor.**—This case standing ready for decision on the bill, answer, and exhibits; and the justice of the claim of one of the complainants, and the insufficiency of the personal estate of the deceased to discharge it, being fully established to the satisfaction of the Chancellor, it is *Decreed*, that the land be sold, &c.

A sale having been made and ratified, and a report having been made by the auditor, the case was thereupon brought before the court.

13th June, 1803.—**HANSON, Chancellor.**—*Ordered*, that the auditor's report be approved and ratified; that is to say, that that statement which does not allow Hanbury and Lloyd interest during the war, is approved and ratified. In no case has the Chancellor allowed interest to a British creditor during the war. In no instance, as he understands, has the General Court allowed interest during the war. The said Hanbury and Lloyd, it seems, have recovered judgments against the said Brown, to be released on payment of principal, with interest to the time of payment generally. The Chancellor conceives the fair meaning of this to be, such interest as is legal, just, and usual. Besides, not the plaintiffs and Brown only were interested on the occasion; the other creditors were interested. In short, the Chancellor is decidedly of opinion, that interest during the war ought to be suspended. However, he is willing to receive any remarks in writing, or even hear an argument, between those concerned, at the next term.

After some time the case was again brought before the court, in relation to this matter, and the solicitors of the parties heard.

17th August, 1803.—**HANSON, Chancellor.**—The complainant Jonas Chapman, as administrator of a British subject, obtained judgment in the General Court against Robert Brown, late of Queen Anne's county, on a bond executed by the said Brown

Although the property of a lunatic cannot, either by a court of common law or equity, be removed beyond the reach of his credi-

to the said British subject before the war. No defence was made, but judgment was entered up in the usual way, to be released upon payment, say of £400, with interest from the date of the bond and costs. Since Brown's death, some of his creditors have obtained a decree, in this court, for the sale of his lands for the payment of his debts. The land hath actually been sold by William Richmond, trustee. And now the said Jonas Chapman, not only claims a preference on account of his judgment, but insists that there shall be no suspension of interest for the time during which the war between the United States and Great Britain was carried on. On the part of the other creditors it is insisted, that interest is due on the said judgment only from the date of the bond to the commencement of the war, viz. to the — day of — 1775 to the end of the war, viz. from the — day of September, 1783.

In various cases of claims exhibited in this court by British creditors against citizens of this state, the Chancellor has directed a suspension of interest during the said war; and indeed the parties have never claimed it. This is the only case in which the point has been made; and as it is a question of law, which probably may come before the General Court in some other case, he takes the liberty of requesting the honourable the judges of the said court to favour him with their opinion on the subject.

On the 7th of October, 1803, the Chancellor again, by an order, asked the opinion of the judges of the General Court; but nothing further appears to have been done in the matter. By the act of 1806, ch. 55, s. 2, the Chancellor may require the opinion of the chief judge of the third judicial district on any question of law, &c.

BOUCHER v. BRADFORD.—This bill was filed on the 18th of February, 1789, by John T. Boucher and others against Eleanor Bradford and others, the administratrix and the infant heirs of Henry Bradford, deceased. It states, that the deceased was indebted to the plaintiffs as therein specified; that his personal estate was insufficient to pay his debts; and that he left real estate which could not be made answerable for the satisfaction of the said claims during the minority of the said infants, but by the aid of this court, &c. Prayer that the realty might be sold, &c. The defendants answered, after which the case was brought before the court.

20th June, 1793.—**HANSON, Chancellor.**—*Decreed*, that the real estate of the said Henry Bradford, deceased, which hath descended from him, or by him been devised to the defendants, his heirs, be sold for the payment of his just debts; it appearing to the Chancellor, that his personal estate is insufficient for that purpose; and several of the claims of the plaintiffs being established to the Chancellor's satisfaction, &c. &c., the purchaser giving bond with good security to the trustee as such, &c. &c.

KILTY v. BROWN.—This was a creditor's bill, filed on the 7th of January, 1807—William Kilty, the then Chancellor, being the only plaintiff and originally suing creditor, the bill was, according to the act of 1805, ch. 65, s. 19, addressed to the chief judge of the third judicial district. The bill stated that John Brown, deceased, was indebted to the plaintiff on several claims, one of which was 'on a note executed by the said John Brown, with Rinaldo Johnson as his security, to Nathaniel Washington, for the sum of sixty-seven pounds, current money, bearing date the fifteenth day of December, seventeen hundred and ninety-eight; which note was assigned by the said Nathaniel Washington to this plaintiff;' and that the personal estate of the deceased was insufficient to pay his debts—whereupon it was prayed that the real estate might be sold, &c.

tors; or be prevented from being taken and applied in satisfaction of his debts; yet in most cases, where a creditor of a lunatic

One of the heirs, a defendant, answered and said, that he admitted the note, but believed 'that the said Johnson was not solely the security; but that both him and the father of this defendant were both jointly indebted in the sum for which the said note was given.'

After which the plaintiff by his petition, without oath, prayed that he might be permitted to proceed against the defendant who had appeared as the heir at common law of the deceased, and by an order of publication against his other heirs, under the act of 1797, ch. 114.

15th June, 1807.—J. T. CHASE, *Chief Judge*.—The object of the bill in this case is to compel the defendants, &c. &c. It is stated by the plaintiff, being the Chancellor of the State and interested in the suit, to the chief judge of the third judicial district, that John H. Brown, one of the defendants, who is the eldest son of John Brown, deceased, therein mentioned, and would have been his sole heir if the act to direct descents had not taken place, has appeared to the said bill and his appearance having been entered on the docket—it is thereupon *Ordered*, that the plaintiff cause a copy of this order to be inserted at least three weeks successively in the Maryland Gazette before the twentieth day of July next, to the end that each of the heirs of the said John Brown, who are defendants, may have notice of the said bill, and of its substance and object, and may be warned to appear in the Chancery Court on or before the thirtieth day of November next, in person or by solicitor, to shew cause, if any they have, wherefore a decree should not pass as prayed.

On the 10th of February, 1809, the plaintiff William Kilty, the then Chancellor, in his notes addressed to the chief judge, says: 'The papers in this case are sent to the chief judge of the third judicial district, on the supposition that they are ready for a decree. It was the practice of the late Chancellor, on bills for the sale of real estates, to decree, without having the case set down for hearing, whenever a sufficient ground appeared in the proceedings. In this suit, a petition was filed in June, 1807, under the act of 1797, ch. 114; and an order thereon, which is certified to have been duly published. The object of this bill is, that the suit may be carried on between the complainant and the defendant who appeared, and that there should be the same decree as if the heirs had appeared, and against them the bill may be either taken *pro confesso*, or a commission may be directed. According to the practice, as above mentioned, the office-copies of judgments have been considered sufficient, if not contested by the answer; and the whole of the claims exhibited have not been required to be proved as stated before a decree; but they have been laid before the auditor with further proof, together with any other claims. This much is intended to apply to that part of the answer which states, that R. Johnson was not a mere surety, but was equally indebted with John Brown. But there is sufficient evidence of the other claim and of the personal estate being deficient.

20th February, 1809.—J. T. CHASE, *Chief Judge*.—The bill in this case, which according to the act of 1805, ch. 65, s. 19, was addressed to the chief judge of the third judicial district, being ready for decision, and the claims of the suing creditor, and the insufficiency of the personal estate being sufficiently established; and the publication having been duly made, after the appearance of John H. Brown, who would have been the sole heir of John Brown, deceased, if the act to direct descents had not taken place, against the other heirs,—

It is thereupon *Decreed*, that the bill as to the said other heirs be taken *pro confesso*; and that the real estate of John Brown, deceased, not heretofore sold, or

applies to a court of equity for relief, the estate of the lunatic will be preserved for his support if practicable, so as to prevent the burthen of maintaining him from being thrown upon the public, and the rents and profits only applied in satisfaction of his debts, so as to leave to the unfortunate person a maintenance out of his own estate, at least during his lunacy, postponing the debts as an incumbrance upon his estate to be satisfied after his death or recovery. (i) In England, though land is not generally liable for debt, yet where on application by the creditor of a lunatic, it is shewn to be necessary to make sale of some of his property for the payment of his debts; and it appears, that his maintenance would be better provided for, and his advantage promoted, by disposing of a real estate inconvenient, ill conditioned, &c.; that it would be for his benefit so to pay his debts, and keep together his personal estate, the court has no difficulty in ordering a sale of such realty. (j) But here lands being in all cases liable for the payment of debts, without denying to the Chancellor here, as in England, the power to consider the advantage of the lunatic, as far as practicable, it is made the duty of the court, on application, to order the lunatic's real or personal estate, to be sold for the payment of his debts. (k)

In the case of infancy, however, it was a general rule of the common law, affirmed and enlarged by legislative enactment, that where the right to the real estate of an infant was attempted to be questioned or charged, that the parol should demur, or, in other

so much thereof as may be necessary to pay such claims of the creditors of the said John Brown which still remain unpaid, be sold: that T. T. be and he is hereby appointed trustee to make the said sale, &c. &c.

Under this decree, a sale was made, reported and ratified; after which the auditor on the 13th of July, 1809, among other things reported, that accounts No. 1 and 2, exhibited by the complainant in this cause, were not proved; and that No. 2 was a joint note of John Brown and Rinaldo Johnson; and if proved without shewing, that Rinaldo Johnson was surety only, the claimant would not be entitled to more than a moiety of the debt.

After which, on the 24th of July, 1810, Nathaniel Washington, the assignor, made oath, that the consideration of the note was for articles purchased by Brown,—that no part of the money was due from Johnson; but that he was considered as the surety of Brown;—upon which, on the 22d of December, 1814, the whole amount was ordered to be paid out of the proceeds of the sale of the deceased's estate.

(i) *Ex parte*, Dikes, 8 Ves. 79; Shelford on Lunacy, 357.—(j) Philips, *Ex parte*, 19 Ves. 123; 1800, ch. 67; 1828, ch. 26.—(k) 1785, ch. 72, s. 5; 1829, ch. 222; 1833, ch. 150; In the matter of Brand, 6 Cond. Chan. Rep. 542.

words, that the judicial proceedings should be stayed until he attained his full age. (*l*)

But it must be recollected, that this is a creditor's suit, as to which it is expressly declared, that where any person dies without leaving personal estate sufficient to discharge his debts, and shall leave to descend, or shall devise real estate to a minor or lunatic, the Chancellor shall have full power upon application of any creditor of the deceased, and after summoning and hearing the infant or lunatic, by guardian or committee; and the claim of the creditor has been fully established, to order the real estate of the deceased to be sold for the payment of his debts. (*m*)

In this instance, the claim of these plaintiffs, as designated, has been admitted, and the insufficiency of the personal assets for the payment of that claim has also been distinctly admitted; and, therefore, upon these admissions, which the committee of the lunatic, and the guardian *ad litem*, of the infant were competent to make; since the answer of a lunatic by his committee may be read against him, as an answer of one of full age and sound mind. (*n*) And the answer of an infant by his guardian *ad litem*, at least in cases of this kind, may be read against him also, as if made by him when of full age; (*o*) there can be no doubt as to the power and duty of the Chancellor immediately to decree a sale of the real estate for the payment of the debts of the deceased, without regard to any postponement or delay to which a lunatic or infant was formerly entitled, or with which they might otherwise have been indulged.

All real estate in Maryland has been made subject to be taken and sold for the satisfaction of the debts of its owner; yet that has not in any manner affected the debtor's right to alien, or devise it *bona fide*, in any way he may think proper. It has, however, been declared by statute, that all devises in fraud of creditors, shall be deemed void; (*p*) that is, where the debtor devises his real estate to any one, without leaving a sufficiency in the hands of his heir, or executor, to pay his debts. Yet, if a testator devises real estate for the payment of his debts, in a way that may be sufficient and effectual for that purpose, it will not be affected by this statute.

(*l*) 1721, ch. 14, s. 2; 1729, ch. 24, s. 16; Taylor v. Philips, 2 Ves. 23; Plasket v. Beeby, 4 East. 485.—(*m*) 1785, ch. 72, s. 5.—(*n*) Leving v. Caverly, Prec. Chan. 229; Wilson v. Grace, 14 Ves. 172.—(*o*) Hammond v. Hammond, post.—(*p*) 3 W. and M. c. 14.

But, if the real estate set apart by the testator for the payment of his debts be insufficient, or be given in such a manner as to be ineffectual, then it will be considered as coming within the meaning of this statute, and be deemed void. Otherwise the creditors must take that real estate of the deceased debtor which he has devised for their benefit, and none other. (*q*)

Here it is alleged and admitted, that the whole of the personalty, together with the real estate, devised by this testator to be sold for the payment of his debts, is wholly inadequate for that purpose. There being, then, an admitted deficiency of the devise for the payment of debts, it falls within the operation of the statute, and must be deemed, as against creditors, absolutely null and void. The case being thus cleared of all embarrassment by reason of that devise, it follows that the real estate of this deceased debtor must be dealt with, in all respects, as if he had made no provision whatever for the payment of his debts, since an inadequate or ineffectual provision is as if none had been made.

But, in behalf of the infants, their guardian objects, that the before mentioned private act of assembly has prescribed a mode whereby the debts of their ancestor are to be satisfied from the estate devised to them; and, therefore, that these creditors cannot be permitted to obtain satisfaction in any other manner.

This objection seems to have been thrown into the answer of these infants, rather by way of an appeal to the indulgence of the court, than with any great degree of confidence in its validity as a bar to the relief claimed by the bill. But when it is recollected how many private acts of this description the general assembly have passed, and how often they have been tempted or urged, by generous feelings or by considerations of the difficulty and hardships of the case, by such enactments, apparently to step beyond the limits assigned to them by the constitution, or to trench upon the confines of the judiciary, it may be well to investigate this matter somewhat more attentively than might otherwise be deemed necessary.

This mode of granting relief in particular and anomalous cases by legislative enactments, is said to have prevailed in England as far back as the beginning of the fifteenth century. (*r*) But even in the earliest times, and always since, when the matter was of such

(*q*) *Hughes v. Doulben*, 2 Bro. C. C. 614.; S. C. 2 Cox, 170; *Bootle v. Blundell*, 19 Ves. 528; *Ashby v. Palmer*, 1 Meriv. 296; *Pow. Mort. by Coven*, 69, 325.—

(*r*) *Hallam Mid. Ages*, vol. 2, c. 8, pt. 3, page 134.

a nature as that relief could obviously be had in the ordinary courts of justice, parliament has refused to interfere, and left the parties to apply to the regular tribunals. But where the petitioner could have no relief, without a special enactment in that particular case, or without a general law comprehending it, then the individual application has been considered, and such a private or public act has been passed as seemed most proper; and, in some instances, a private clause has been inserted in a public statute to suit the particular case, so that the statute has been, in fact, both public and private in its several provisions. It appears, too, that the fees for obtaining relief in this way, in England, are taxed like the costs of a suit in the ordinary courts of justice. (s)

A private act of parliament, although strictly and literally followed, as regards the authority and jurisdiction conferred, (t) is in many respects considered and construed as a mere legal conveyance, in general, binding only on those who are parties to it; that is, those who petition for it, or are named in the act itself, and those claiming under them. (u) It is never permitted to affect the

(s) *Spelman v. Woodbine*, 1 Cox, 49; *Wheeler Ex parte*, 3 Ves. and Bea. 21; *Holmes v. Higgins*, 8 Com. Law Rep. 27; *Dwarris on Statutes*, 628.

The evils of this private legislation, it is said, in an able English Review, consists in the impossibility of giving proper attention to more business of the sort, which is already too abundant, and distracts the attention of legislators from the larger and more universal matters of state to the smaller and particular affairs of districts; a vice, in a national assembly, of which few can conceive the magnitude, who are not aware of the universal force of gravitation towards self, and one's own kin and fellows, which, in the most intelligent, will often sacrifice to a class the good of the community. What would not be given to bribery in other forms, is given in this. The bad legislator wins the hearts of his constituents, by attending to their private and local affairs; at least this is always found, in commercial communities, to be an effectual compensation for the want of statesmanship. The justice and propriety of throwing the expense upon individuals desirous of obtaining particular advantages by means of acts of parliament, can only be judged of, by ascertaining whether a distinction is always made between a personal and a general object. But it is more than to be suspected, that the reference to the legislature at all, on many matters, results from the deficiency of other institutions; and therefore, whether the objects be individual or national, there is a wrong done by continuing the system. The probability is, that in one shape or other, in the greater cost of the object, or in the lack of its more expensive use, the nation pays first or last. An instance is mentioned of a case where a bill was withdrawn, on account of the cost arising from these fees; and the writer knows another instance, where the public bodies and inhabitants of a town were deterred by the same reason. From all of which it is to be inferred, that there are other instances of the same kind. In all of which the legislature commits a wrong.—*Westminster Review*, January, 1834, No. 39, page 33.

(t) *Ex parte*, King 2, Bro. C. C. 158; *Ex parte*, Bolton School, 2 Bro. C. C. 662, 2 Mad. Chan. 719.—(u) The case of the Chancellor of Oxford, 10 Co. 57; *Hesketh*

interests of strangers, or to defeat the rights of *bona fide* purchasers for a valuable consideration; because, as to strangers, a private act is considered only in the light of a private conveyance; (*w*) as where an act gave the lands of Priory's alien to the king, it was held, that it did not extinguish an annuity of a Prior, which he had out of a rectory; although there was not any saving in the act; and so too, where a statute makes a conveyance good against the king, or any certain person, it is not allowed to take away the rights of any others although there be not any saving in the act. (*x*) But where there is an estate in remainder, which the party may bar by a fine and common recovery, in such case, the claimant of such outstanding estate may be bound by a private act of parliament, although not named in it; because the legislative enactment is only another form of effecting that which might have been done by an ordinary course of judicial proceeding. (*y*)

In a case however, where a private act of parliament was passed authorizing the sale of a real estate, during the infancy of the heir, to pay debts, which directed, that the mortgage should be *first* paid; and it afterwards appeared, that there were judgments by which the estate was bound *prior* to the mortgage; it was nevertheless held, that the act must be obeyed, and the mortgage *first* paid. But it seemed to be admitted, that, by virtue of the general saving in the act, the judgment creditors might make use of their incumbrances as they could at law. This determination appears to have been pronounced with some hesitation and reluctance. (*z*) The parliament, by thus arbitrarily altering the rights of the parties, and ordering the mortgage to be *first* paid to the prejudice of *prior* judgment creditors, exerted a kind of supreme power, which it has been declared, should never be exercised upon any occasion, and was too dangerous to be entrusted even to that body. (*a*) No court of justice, of England, has ever ventured to assume such a power, in any form; for as it has been said, men's deeds and wills, by

v. Lee, 2 Saund. 96, a.; *Boulton v. Bull*, 2 H. Blac. 499; *Perchard v. Heywood*, 8 T. R. 472; *Wallwyn v. Lee*, 9 Ves. 25; *Bullock v. Fladgate*, 1 Ves. & Bec. 471; *Vauxhall Bridge Company v. Earl Spencer*, 2 Mad. Rep. 355; S. C. 4 Cond. Chan. Rep. 28; *Edwards v. The Grand Junction Railway Company*, 10 Cond. Chan. Rep. 85; *Moore v. Usher*, 10 Cond. Chan. Rep. 107; 2 Blac. Com. 344; 5 Cruise Dig. tit. 33.—(*w*) *Pomfret v. Windsor*, 2 Ves. 480.—(*x*) *Sir Francis Barrington's case*, 8 Co. 271; *Provost of Eton v. Bishop of Winton*, 3 Wils. 496; *Townley v. Gibson*, 2 T. R. 705; *Riddell v. White*, Anstr. 281; *Dwarris' Statutes*, 635; 5 Cruise Dig. tit. 33.—(*y*) *Westby v. Kiernan*, Amb. 697.—(*z*) *Ward v. Cecil*, 2 Vern. 711.—(*a*) *Kames' Pri. Eg. b. 1, p. 1, s. 4.*

which they dispose of their estates, are laws which they are allowed to make, and which are not to be altered even by the king in his courts of law or conscience. (b)

It has been held in England, that a private act of parliament which had been obtained by fraudulent suggestions, or by a suppression of the truth, might, on that ground alone, be relieved against by any court of law or equity in which the fraud could be fully and clearly shewn. As was done in a case in the High Court of Chancery of England, before our revolution, in which an act of the legislature of the then province of Pennsylvania was, about the year 1725, set aside on the ground of its having been obtained by fraudulent suggestions. (c) And so too, in some other cases, where private acts had been passed by the parliament of England, upon false suggestions, they were, upon that ground alone, vacated by the Court of Chancery on a bill filed by the party grieved. (d)

It seems to be generally admitted, in England, that the rehearsal or recital of general and public facts and circumstances in a statute cannot be denied; such as the rehearsal in the statute *de donis* of what was the common law before the passing of that act, (e) or the recital in a statute, that great outrages had been committed in a certain part of the country; and that therefore the statute was

(b) *Cary v. Bertie*, 2 Vern. 337; *Wright v. Simpson*, 6 Ves. 731; *Kendall, Ex parte*, 17 Ves. 525; *Sumner v. Powell*, 2 Meriv. 30.

(c) *Penn v. Baltimore*, 1 Ves. 454; 5 Cruise Dig. tit. 33, 5, 50.—*Francis Fane*, counsel to the board of trade, in his opinion given to that board, on the 3d of March, 1725, respecting an act passed by the General Assembly of Jamaica to foreclose a mortgage, says: 'I think, in general, that such laws would be greatly dangerous, and that the legislature should rarely interfere in matters of private right, without the greatest necessity; but, I cannot see any great inconvenience in this case, but rather a necessity indeed, for passing the law,' &c. After which he proceeds further to say, that 'Mr. West, in his report upon this matter, is of opinion, that all facts alleged in the colony bills must be taken to be true. This rule may, generally, be true; but I think, in adversary bills of this nature, which are only the party's own state of the case, this rule should not be extended further than the particular facts mentioned; but, I apprehend, it ought not to be presumed, that every thing is fully stated, and that all facts and circumstances are disclosed, that are necessary to give a perfect insight into the merits of the bill; for though the facts alleged may be true, yet other facts may be sunk, which may alter the case, and defeat the allegations of the bill; neither do I think it safe to argue from the analogy and reason of penal laws in the plantations, to a bill of this kind; because rules of state policy are no proper measure to adjust private property.' 2 Chalmers's Opin. Em. Lawyers, 8, 10, 41; *Partridge v. Dorsey*, 3 H. & J. 307, note; *Owings v. Speed*, 5 What. 420.

(d) 5 Cruise Dig. tit. 33, s. 51, 53; 2 Blac. Com. 346.—(e) Co. Litt. 19.

passed. (*f*) Such statements of facts, of a public nature, upon which the government had acted, must, for all such public purposes, be taken to be true. But then no particular fact can be assumed or declared by the legislature to be true so far as to affect the rights of a person, or the title of an individual to any property. Not because it would be indecent or improper to question the motives or purity of the legislative body, who must always be presumed to act rightly and to set forth the truth, until the contrary is clearly shewn; but because, in all such cases, it may, without any impeachment of their integrity, be presumed that they have been misled or misinformed. As where a statute recited, that a certain person had been attainted, when in truth such was not the fact, the party was not thereby concluded and prevented from shewing the truth. (*g*) And so where the preamble of an act of parliament recited, that the plaintiff's father had not been married, yet he was allowed to prove that he had been married; and so to obtain a verdict, founded upon the fact of his legitimacy, in direct opposition to the recital in the act of parliament. (*h*) But the parliament of England, on principles of state policy, not applicable to cases of a civil nature, have, in many instances, passed bills of attainder, by which facts have been assumed to be true, without the formality of proof, and individuals have been attainted, condemned to death, and their estates confiscated without even calling on them to answer. It cannot be denied, that for all such purposes, that that legislative body has the power to assert the truth of any facts to the destruction of an individual without leaving to him the means of controverting what had been thus asserted in any judicial manner or form whatever. (*i*)

Even in England there are many cases in which the courts of justice found their judgments upon considerations of public utility, looking to politics, or that which is deduced from the frame of the government of the country. (*j*) Here it has become very common of late to speak of the *sovereign power*, and of the *sovereignty* exercised by our *government*. These words do not, however, occur either in the constitution of this state, or in that of the Union. The words *sovereign* and *sovereignty* refer to him, or that body of men who possess the supreme power of the state; who

(*f*) *Rex v. Sutton*, 4 Ma. & Sel. 532.—(*g*) *The Earl of Leicester v. Heydon*, 1 Plow. 398.—(*h*) *Bull*, N. P. 112; *Co. Litt.* 360.—(*i*) 4 *Inst.* 37; *Com. Dig.* tit *Parliament*, H. 6.—(*j*) *Earl of Chesterfield v. Janssen*, 2 *Ves.* 156.

have no superior, and who hold the supremacy, the highest authority at discretion and without responsibility. In England the monarch alone wears 'the golden yoke of sovereignty.' All discretionary and irresponsible power belongs to him only; except in so far as it has been expressly chartered out by him to the parliament or the judiciary. (*k*) When the king and the parliament, however, unite, they are indeed clothed with a *sovereignty* which is, to the extent of all human power within the range of their jurisdiction, altogether omnipotent. Yet it has been held in England, as well as in this country, that if a legislative enactment, owing to some oversight or mistake of its makers, directs that to be done which is palpably absurd, unnatural, unjust or impracticable; as that a party should sit as judge in his own cause; or that a penalty should be imposed upon those who should *not* propagate slander, instead of upon those who should do so; (*l*) or that those should be punished who should pass as true a forged note issued by a bank, instead of those who should pass a forged note purporting to be a note issued by a bank; (*m*) apart from any constitutional restriction, must be regarded as absolutely void; on the ground of its being impracticable innocently to execute it; because of its obscurity, absurdity, repugnance or injustice. (*n*)

But the government of this republic has been clothed with no such sovereign power, or sovereignty as that of England, either altogether, or in any of its departments. Taken collectively, or in any of its several parts, it is most truly and strictly made up of responsible and delegated power; it is not, in any sense, sovereign, or a sovereignty. For, wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of *sovereignty*. (*o*) Our's is a government assumed *under* the authority of the people; it originated from the people, is founded in compact only, and instituted solely for the good of the whole; and all persons invested with the legislative or executive powers of government are the trustees of the public, and as such

(*k*) Bac. Abr. tit. Prerogative, 487; Hallam's Mid. Ages, ch. 8, pt. 3, p. 183.—

(*l*) The Lord Cromwell's case, 4 Co. 12.—(*m*) The United States v. Cantril, 4 Cran. 167.—(*n*) The Lord Cromwell's case, 4 Co. 13; Dr. Bonham's case, 8 Co. 236; Dr. Foster's case, 11 Co. 63; Day v. Savage, Hob. 87; The City of London v. Wood, 12 Mad. 687; Weale v. West Middlesex Water Comp. 1 Jac and Wel. 371; Dwaris' Statutes, 643; Montesq. Spirit Laws, b. 26, ch. 3.—(*o*) 1 Blac. Com. 244.

accountable for their conduct. (*p*) These are our fundamental axioms and first principles; consequently, the general assembly, or all, or any portion of our government cannot exercise *sovereign* authority, in any case, over any subject whatever; since it is clear that, when regarded in this point of view, our whole government must be considered as strictly limited, as well by its general nature, as by the special provisions of the constitution itself. Here, therefore, the *sovereignty* belongs altogether and exclusively to *the people* of the state. (*q*)

It is declared, that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other; (*r*) that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; (*s*) and that no freeman ought to be taken, or imprisoned, or dis-seized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land. (*t*) Consequently, the general assembly must be considered as restrained, not only by the general principles and delegated nature of the government itself, from exercising any arbitrary power over the rights or property of an individual; but according to this declared separation of powers, and under the positive restrictions by which its powers are limited, it can exercise no authority which is manifestly beyond the confines of its own legitimate sphere as a legislative department. (*u*) It cannot adjudicate upon any matter in the manner of a court of justice; (*w*) it can make no partial distinctions among citizens, (*x*) or pass any law impairing the obligation of contracts; nor can it be allowed to assume the truth of any facts upon which of itself to pronounce a judgment, or to direct the judiciary to do so in any manner, so as onerously or destructively to affect the rights of any one; or, by passing or repealing any law, to deprive any one of a previously vested right of property. (*y*) And looking to the delegated and

(*p*) Decla. Rights Maryland, art. 1 and 4.—(*q*) Vanhorne's Lessee *v.* Dorrance, 2 Dall. 311; *Calder v. Bull*, 3 Dall. 386; *Dash v. Van Kleeck*, 7 John. Rep. 477; *Enslin v. Bowman*, 6 Binney, 471; *Trustees of the University v. Foy*, 2 Haywood, 310, 374; *Satterlee v. Matthewson*, 2 Peters, 380; *Wilkinson v. Leland*, 2 Peters, 628; *Crane v. Meginnis*, 1 G. and J. 463.—(*r*) Decla. Rights Maryland, art. 6.—(*s*) Const. U. S. art. 1, s. 10.—(*t*) Decla. Rights Maryland, art. 21.—(*u*) *Berrett v. Oliver*, 7 G. and J. 206.—(*w*) *Dash v. Van Kleeck*, 7 John. Rep. 508; *Evans v. Eaton*, 3 Wheat. 513; *Crane v. Meginnis*, 1 G. and J. 476.—(*x*) *Kames' Pri. Eq. b. 2, c. 3*; Decla. Rights Maryland, art. 39.—(*y*) *McMechen v. The Mayor of Baltimore*, 2 H. and J. 41.

very limited nature of our government, as compared with that of England, it may be confidently affirmed, that this court would be acting entirely within the range of its unquestionable authority, in going fully as far as the English tribunals have gone, in controlling all legislative enactments, in relation to private property ; by disregarding the facts assumed in the enactment, when found to be untrue ; by setting such legislative enactments aside when obtained by fraud ; and by confining their operation, so as to prevent them from impairing the obligation of contracts, or affecting the rights of purchasers, or the interests of third persons who are strangers to them. And in treating all special and private legislative enactments as a sort of conveyances which can only be allowed to bind those who are parties to them by having asked for or assented to their passage. (z)

Where it appeared, that, in consequence of a misrepresentation to the general assembly, the party had obtained that which he could not have obtained on a fair and full statement of facts ; that he had not only concealed facts, which, if known, would have defeated his purpose ; but had suggested a matter which he knew to be contrary to the truth. It was held by this court to be inconsistent with reason and justice to suppose, that, because the defendant's patent was sanctioned by an act of the legislature, his title must be clear and indefeasible ; and that the court was precluded from an examination of the circumstances alleged in the bill. That the legislature, not being constituted for the investigation of facts, relative to the rights of individuals, or of matters in controversy between private persons, it never could be admitted, upon any sound principle of justice, that any allegation or matter of fact assumed in a legislative enactment should be considered as incontrovertible by any one not a party to it. For ever if the legislature should be deemed a tribunal competent to the examination of facts, and that too from which there should be no appeal, it was certainly an universal rule, that no man should be affected by a decision to which he was neither party nor privy. (a) Nor is the truth of any fact thus assumed in an act of one general assembly, considered as at all conclusive upon their successors. As where it had been asserted, that the object contemplated by the act incorporating *The Potomac Company* had been accomplished ; (b) the truth of that

(z) *Beall v. Harwood*, 2 H. & J. 171 ; *Owings v. Speed*, 5 Wheat. 420 ; *Cassell v. Carroll*, 11 Wheat. 149.—(a) *The State v. Reed*, 4 H. & McH. 10 ; *Fisher v. Lane*, 3 Wilson, 302 ; 1826, ch. 164.—(b) 1802, ch. 84.

fact was virtually denied by the act of a succeeding general assembly, which allowed the further time of ten years to accomplish the object. (c)

In Maryland private acts of assembly have been common, from the earliest period of the proprietary government, (d) down to the present time, and it has been laid down as a general rule that all petitions praying for such enactments must be couched in decent and respectful terms. (e) It appears, that under the provincial government; and even since the revolution, certain fees were, here as in England, paid by the applicants for such acts to the officers of the general assembly by whom they were passed. (f) But the allowance of fees for the passage of any such laws has, long since, been discontinued. It also appears, that although it has been deemed necessary to adhere closely to the express provisions of all such special enactments, in so far as they confer any new power or jurisdiction; yet that, here as in England, they have, in many respects, been construed, and executed as mere conveyances, binding only upon those who are parties or privy to their passage. (g) It is certain, that in so far as the provisions of any private act are confined within the constitutional competency of the general assembly, they must be considered as binding and effectual as those of any constitutional public law. And it may be admitted, that the general assembly has the power, in many cases, to lend its aid to an agreement between individuals, so as to render it effectual, when any merely public reason or positive rule of law stands in the way; as to enable a body politic, or particular persons to levy contributions, to a certain extent, for some special purpose connected with the public good; (h) or it may sanction an encroachment which had been made upon a public right, through misapprehension; as by allowing an individual to continue to hold as his own a part of a street upon which, by mistake, he had erected his

(c) 1809, ch. 192.—(d) 1650, ch. 18 and 19; 1663, ch. 35; 1666, ch. 7 and 8; 1669, ch. 4.—(e) Votes and Proc. Ho. Del. 7 and 16 January, 1803; and 5 and 7 January, 1804.—(f) 1794, ch. 74. It appears from the report of a committee appointed at November session, 1789, to tax the costs and expenses which had accrued on the petition of Benjamin Mackall, and others against the petition, exhibited on behalf of the Reverend Francis Lauder, that those costs and expenses were made up of the *per diems*, itinerant charges, and ferriages of the parties and witnesses; and amounted to £197 0s. 0d. current money of that time, as it is presumed. The report of the committee was not agreed to. Votes and Proc. Ho. Del. 29 December, 1779.—(g) 1794, ch. 45: *Beall v. Harwood*, 2 H. & J. 168; *Partridge v. Dorsey*, 3 H. & J. 307, note, and 322.—(h) *The King v. Toms*, 1 Doug. 406; *Perchard v. Heywood*, 8 T. R. 472.

house; (*i*) or the general assembly may, without prejudice, and for beneficial purposes, lend its aid to supply defects in an agreement which could not be supplied by any judicial proceeding without the help of such an enactment; although there existed sufficient evidence of the assent of the party; (*j*) or, it may, without injuriously affecting the interests of any one, but for the benefit of all, authorize a sale, a settlement or the disposition of an estate to be confirmed or made, which was impracticable, according to the established rules of law, by reason of the infancy, (*k*) the coverture, (*l*) the lunacy, (*m*) or the alienage (*n*) of one or more of the parties concerned; or it may, without prejudice, authorize the making of leases; (*o*) or the execution of a power; (*p*) or the making provision for a wife or children; or the selling of estates to pay debts or the like. (*q*)

A contract of marriage is, in many respects, so highly important in its nature as not only to involve the interests and happiness of the immediate parties, and to require the free consent of a man and woman who have a perfect bodily (*r*) and mental capacity to contract; (*s*) but, it is a contract to which society is a party, and in which it has a deep interest; and on that account it is, perhaps, that a marriage, which has been fairly and legally consummated, cannot be dissolved by a judicial determination, founded on any subsequent breach of its terms, without the consent of the community expressed by its representative legislature, or by the supreme authority of the state. The spiritual court, in England, and some of the courts of justice of Maryland, have been clothed with authority to determine on the validity of a contract of marriage; yet they cannot divorce, from the bonds of matrimony, for any cause *subsequent* to the marriage; for, if there has been a valid marriage, those tribunals are not competent to rescind it; so that a

(*i*) 1807, ch. 76 and 119.—(*j*) Kame's Pri. Equi. b. 1, pt. 1, s. 4; 2 Sugd. Pow. 97; 1800, ch. 54; 1801, ch. 53 and 96; 1802, ch. 37; 1805, ch. 68; 1807, ch. 5.—(*k*) Blois v. Hereford, 2 Vern. 501; Attorney-General v. Day, 1 Ves. 224; Taylor v. Philips, 2 Ves. 23; Hearle v. Greenbank, 3 Atk. 712; 1800, ch. 54; 1803, ch. 72 and 90; 1819, ch. 38.—(*l*) Harvey v. Ashley, 3 Atk. 613; 1802, ch. 8; 1813, ch. 134 and 153; 1818, ch. 58; 1822, ch. 111.—(*m*) Shelf. Lun. 372; 1784, ch. 1; 1805, ch. 56; 1809, ch. 41; 1821, ch. 210.—(*n*) 1800, ch. 68; 1807, ch. 10, 11 and 86.—(*o*) 1802, ch. 40.—(*p*) Hearle v. Greenbank, 1 Ves. 305; 1826, ch. 163; 1827, ch. 73.—(*q*) Ridout v. Plymouth, 2 Atk. 105; Buchanan v. Hamilton, 5 Ves. 722; Walwyn v. Lee, 9 Ves. 24; Com. Dig. tit. Parliament, H. 5; 1804, ch. 11; 1813, ch. 134; 1815, ch. 151.—(*r*) Sabell's Case, Dyer, 179; Bury's Case, 5 Co. 99.—(*s*) 1 Blac. Com. 439.

sentence of divorce is not so properly a dissolution of the contract as a declaration of its original absolute nullity. (*t*) Hence, it seems to have been generally admitted, that the constitutional restriction, which declares, that no state shall pass any law impairing the obligation of contracts, does not extend to a contract of marriage; (*u*) and, therefore, that the general assembly may, by law, grant a divorce from the bonds of matrimony, with all its consequences, or in a limited manner, or upon any terms deemed most proper; (*w*) or they may sanction a separation, by authorizing the appointment of a trustee to take care of the estate of a fugitive convict for the benefit of his wife and children; (*x*) or by making provision for carrying into effect articles of separation. (*y*)

But although children may be thus deprived of capacities, which would have been incident to their legitimacy, and be bastardized, as a consequence of the divorce of their then living parents; (*z*) yet, in regard to a law, which, without affecting a then existing contract of marriage, or which has been passed after its dissolution by death, declares the issue to be bastards, other considerations arise. Legitimacy is a legal capacity whereby property may be acquired by descent, &c; or, indeed, it may itself be regarded as a valuable kind of property, or a privilege of which the general assembly cannot constitutionally deprive any one, since the legislature cannot so judicially act upon the case as to deprive him of any legal capacity, privilege, or property with which he has been legally invested. (*a*) But, on the other hand, it may be admitted, that the General Assembly may, prospectively and without prejudice to the rights of others, declare a marriage to be valid, and any bastards to be legitimate, and thus confer upon such individuals a new and additional capacity; upon the same ground, that they may grant to an alien a capacity to take and hold in any case which may thereafter happen in like manner as a natural born citizen. (*b*)

It may also be admitted, that the general assembly may, consti-

(*t*) Bac. Abr. tit. Marriage and Divorce, E. 3; *Ryan v. Ryan*, 1 Ecclesi. Rep. 274; February 1777, ch. 12, s. 15.—(*u*) *Dartmouth College v. Woodward*, 4 Wheat. 629, 693.—(*w*) 1790, ch. 25; 1807, ch. 20, 30, and 103; 1818, ch. 56.—(*x*) 1821, ch. 80.—(*y*) Com. Dig. tit. Parliament, H. 3; *Eyre v. The Countess of Shaftsbury*, 2 P. Will. 112; 1822, ch. 100.—(*z*) 1 Blac. Com. 457.—(*a*) 4 Inst. 36; *Dash v. Van Kleeck*, 7 John. Rep. 504.—(*b*) 4 Inst. 36; *Domat Civil Law*, part 2, b. 1, tit. 1, s. 2, art. 31; 1784, ch. 6; May, 1788, ch. 8; November, 1788, ch. 21; 1897, ch. 73; 1808, ch. 13; 1814, ch. 120.

tutionally, so that it be without prejudice to any one, confirm an anti-nuptial settlement, (c) or cure the defects in any contracts or conveyances, so as to quiet the possessions of purchasers and others. But in doing so, they can exercise no power which has been delegated exclusively to the government of the United States; nor any power properly belonging to the judicial department; nor can they suspend the recovery of debts, or deprive any one of a privilege, or impair the obligation of contracts, or divest any right previously vested so as thereby, in effect, arbitrarily to take property from one person and give it to another. (d)

With regard, therefore, to the case now under consideration, it follows from what has been said, that this act of assembly, (e) by which the devisees of the late *William Campbell* have been authorized to mortgage his real estate, can, in no way, be allowed to alter or affect the rights of his creditors. For, mortgaging the assets is not the natural way of paying debts with them; although, in some cases, it may be the most expedient mode; as where a sufficient sum may be raised in that manner to satisfy all the creditors, without delay, and without prejudice to the heirs, devisees, legatees, or next of kin of the deceased. (f) This special act may be admitted to be fully, and in all respects obligatory upon those devisees who are parties to it, and at whose instance alone it was passed; but the creditors of the testator, being entire strangers to it, must be permitted to stand here as if it had never been passed; and to sustain their rights against these devisees, in like

(c) 1507, ch. 5.—(d) *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304; *Calder v. Bull*, 3 Dall. 386; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Owings v. Speed*, 5 Wheat. 420; *McCreery v. Somerville*, 9 Wheat. 354; *Satterlee v. Mathewson*, 2 Peters, 380; *Wilkinson v. Leland*, 2 Peters, 627; *Dash v. Van Kleeck*, 7 John. Rep. 477; *Enslin v. Bowman*, 6 Binn. 462; *Trustees of the University v. Foy*, 2 Haywood, 310, 374; *Jones v. Crittenden*, 2 North; *Carol. Law Repository*, 385; *Berry v. Haines*, 2 Ib. 428; *Allen v. Peden*, 2 Ib. 638; *Opinion of the Judges of Georgia*, 2 Ib. 31; *Per Judge Martin of Louisiana*, 2 Ib. 173; *Crane v. Meginnis*, 1 G. and J. 463; *Berrett v. Oliver*, 7 G. and J. 192; *Acts of Assembly of Maryland of 1781*, ch. 3; 1785, ch. 9; 1795, ch. 30; 1807, ch. 24, 52, 121, 138, and 149; 1808, ch. 17, 73, and 101; 1809, ch. 164; 1811, ch. 101; 1814, ch. 14; 1815, ch. 71; 1816, ch. 164; 1817, ch. 204; 1818, ch. 90; 1819, ch. 53; 1820, ch. 147, and 172; 1825, ch. 88; 1826, ch. 7, and 164; 1827, ch. 67, and 141.—(e) 1825, ch. 135, ante 215, note.

(f) *Andrew v. Wrigley*, 4 Bro. C. C. 138.—By the act of 1831, ch. 311, s. 12, if constitutional, this court has been clothed with power to mortgage the interest of infants in lands, where it shall appear to be for their advantage so to procure money, for the benefit of such estate of the infants; or to improve the same, or to relieve it from any incumbrance, or otherwise, for the benefit of such infants.—*Williams' Case*, post. 3 vol.

manner as if they, the devisees themselves, being competent to contract, had, of themselves, mortgaged the estate devised to them.

The heir of a deceased debtor, at common law, was only bound for the payment of the bond debts of his ancestor, because of the express terms of the obligation, and in respect and to the extent only of real assets descended; which liability of the heir has been, in Maryland, extended by statute in favour of all simple contract creditors, in like manner as to bond creditors. (*g*) By the common law, if a debtor, instead of suffering his real estate to descend to his heir, devised it to any person; or if the heir aliened the land, before an action was brought against him, the creditor was without remedy. But this injustice has been removed by a statute which declares, that all devises, as against creditors, shall be deemed fraudulent and void, and that the heir or devisee, after any such alienation, shall be liable to the value of the land so by him sold. (*h*) In consequence of which, and as mere bond or simple contract creditors have no lien upon the real estate of their debtor, the heir or devisee becomes personally liable to the value of the realty by him so aliened, leaving the land in the hands of a *bona fide* purchaser entirely free from their claims; (*i*) or such creditors may follow the

(*g*). 5 Geo. 2, c. 7.—(*h*) Bac. Abr. tit. Heir and Ancestor F.—(*i*) *Coleman v. Winch*, 1 P. Will. 777. *Mathews v. Jones*, 2 Anstr. 506.

CRAIG v. BAKER.—This bill was filed by Robert Craig, on the 17th of September, 1770, against the administrator, heirs, and devisees of Henry Baker, deceased. It stated that the plaintiff and the late Henry Baker were the owners of a brig, and as partners had her sent on several voyages; that the plaintiff purchased Baker's half of the vessel for £650 0s. 0d.; and it was then agreed between them, that all their accounts should be fully and finally adjusted; but before they came to any settlement Baker died, having first made his will, by which he disposed of all his estate, real and personal, among his children; that his son Francis, who became his administrator, alleges that his personal estate is not sufficient to pay his debts; that the administrator has brought suit at law against this plaintiff for the recovery of £650 0s. 0d., the price of his intestate's half of the brig; and also, to recover the amount of certain protested bills of exchange, drawn on account of the partnership concern; that on a fair adjustment of accounts it will appear, that the late Henry Baker was greatly indebted to the plaintiff. Prayer for an account; for an injunction to stay the proceedings at law; and for general relief. An injunction was granted as prayed, and the defendants answered.

A commission was issued on the 18th of July, 1774, in the usual form, to audit and state an account. Under which the commissioners, on the 7th of May, 1785, returned an account, by which it appeared, that there was a balance due to the plaintiff of £863 3s. 3d. with interest thereon from the 22d of April, 1767, to the 22d of April, 1785.

The plaintiff, with leave, filed an amended bill, in February, 1786, the making other

specific produce of the real assets, and take it from any one in

devisees and their heirs parties, specifying the real estate which came to their hands ; and then alleging, 'that all the parties aforesaid claiming under the will of Henry Baker aforesaid first named, have had notice of your orator's claim ; but none of them have ever paid or offered to pay any part thereof ; and also, that the estates held by the other defendants, Jeremiah Baker, of Cecil county, Henry Baker, son of Francis, of Harford county, and Nathan Baker, of Cecil county, which they derived from Henry Baker first mentioned, together with the personal estate of the said Henry, and the estate devised to Francis, his son aforesaid, are greatly more than sufficient to pay your orator's claim.'

The defendant Jeremiah Baker, by his answer, without admitting the plaintiff's claim, stated among other things, that the tract called Clayfall, devised to him, was without improvements, and had been mortgaged, and came to him so mortgaged, which mortgage he had satisfied ; that there was no improvements on the said land at the time of the death of the said Henry ; but that this defendant hath since made valuable improvements, and erected buildings thereon ; that the personal estate of the said Henry was not sufficient, as he understood and believed, to pay the claims against him ; that he had no knowledge, that any balance was due to the plaintiff, but had always understood and supposed the contrary ; and that in any event he could only be answerable for the reasonable value of the said lands to him devised, as they were without improvements, at the time of the death of the said Henry, after deducting the amount of the mortgage money paid by him, this defendant.

The administrator Francis, by his answer, admitted, that he was a devisee, and as such held a portion of the real estate of his father ; and said that he had no assets in his possession, and had fully administered the same, and had paid away of his own money, in discharge of the debts of the said Henry above and beyond the personal property of the said Henry, which had come to his possession as administrator, upwards of seventy pounds current money, computing dollars at six shillings, as would appear by his account passed in the commissary's office, which he annexed and prayed to be received as a part of his answer, which amount he was in equity entitled to retain against any creditors of the said Henry out of the value of the said property devised to him.

The infant defendant Nathan Baker, answering by his guardian *ad litem*, admitted, that he held possession as heir of his father Jethro, the tract called Vanbibber's Forest, which was devised to him by the late Henry. And he also averred, that the administrator had in his hands, unaccounted for, assets sufficient to pay all the debts of the deceased.

Upon which commissions were issued and testimony taken and returned, and the case was thereupon brought before the court.

6th January, 1790.—HANSON, Chancellor.—This case standing ready for hearing, and coming on to be heard and debated by counsel as well on the part of the complainant as on the part of the defendants, and the bill, answers and several exhibits aforesaid having been read, and appearing as herein before set forth.

Whereupon it is *Decreed*, that Robert Craig, the complainant, is entitled to recover and receive from the real estate of Henry Baker, senior, deceased, the sum of £868 3s. 3d. current money, with interest thereon from the 7th day of May, 1785, that being the day on which the debt due from the said Henry Baker, senior, was liquidated and ascertained by the auditors chosen by the parties ; and that the complainant is further entitled to receive from the said real estate his legal costs by him expended in the prosecution of this suit.

And it is further *Decreed*, that the defendant Francis Baker, devisee of the said

whose hands it may be found. (j) These principles however apply only to cases where an alienation has been made by an heir or devisee before the institution of a suit by a creditor for the purpose of subjecting the real estate of his debtor to the payment of his debts. But to prevent justice from being baffled, and a traffic in litigated titles, no alienation is allowed to be of any avail against the interests of the parties to a *lis pendens*. To constitute such a *lis pendens*, in this court, it is sufficient, that there be a bill filed and a *subpœna* returned served in a suit, the object of which is to affect the right to the estate. During the pendency of such suit, a defendant can, in no way, encumber or sell the estate to the prejudice of a plaintiff who may have a claim upon it; or of a party

Henry Baker, senior, hath in his hands the sum of £100 current money, that being the consideration which he received for a house and lot in Charles Town, Cecil county, sold by him, and which house and lot had been devised to the said Francis Baker, by the said Henry Baker, senior, and was liable to the payment and satisfaction of the debt and interest thereon due to the complainant.

And it is further *Decreed*, that the same sum of £100, and interest thereon, from the 7th day of May, 1785, is and shall be assets in the hands of the said Francis Baker, devisee aforesaid, who is hereby ordered to pay the same to the complainant towards satisfaction of his debt, interest thereon and costs aforesaid.

And it is further *Decreed*, that the defendant Nathan Baker, devisee of Jethro Baker, who was devisee of Henry Baker, junior, who was devisee of Henry Baker, senior, hath in his hands the tract of land, called Vanbibber's Forest, liable to the payment and satisfaction of the sum of money aforesaid, and interest thereon, and costs hereby decreed to the complainant. And it is *Ordered*, that the said tract of land, called Vanbibber's Forest, is and shall be assets in the hands of the said Nathan Baker, devisee aforesaid, to satisfy the complainant the debt, interest and costs aforesaid.

And it is further *Decreed*, that the defendant Jeremiah Baker, hath in his hands a tract of land, called Clayfall, devised to him by the said Henry Baker, senior, deceased; that the said tract of land, being at the time of the decease of the said Henry Baker, senior, of the value of £900 current money, and at the same time under mortgage for a debt of £300 sterling, equal to £500 current money, and the same devisee having since redeemed the said mortgage, he, the said Jeremiah Baker, is answerable to the complainant for the sum of £400 current money, with interest thereon from the 7th day of May, 1785; it is, therefore, *Ordered*, that the defendant Jeremiah Baker, pay to the complainant towards the satisfaction of his debt, interests thereon and costs aforesaid, the sum of £400 current money, with interest thereon, from the 7th day of May, 1785, aforesaid.

And the said defendant Henry Baker, brother and heir of Samuel Baker, who was devisee of Henry Baker, senior, having stood out the process of this court, it is *Decreed*, that the complainant may proceed to take out a commission to prove his allegations against the said defendant Henry Baker, subject to such future order and decree therein, as this court shall make respecting the same; 1785, ch. 72, s. 19.—*Chancery Proceedings*, lib. S. H. H. lett. C. fol. 111, 136.

(j) *Ex parte*, Morton, 5 Ves. 449.

who, as a creditor, may have a right to have it sold as assets to be applied in satisfaction of the deceased's debts. (*k*)

In this case, long after a suit had been instituted by these very devisees themselves, to have the real estate of this deceased debtor sold for the payment of his debts, they applied to the general assembly and obtained this special act, authorizing them to raise money for the payment of those debts by way of mortgage instead of a sale of the realty; which act they did not ask this court to carry into effect for their benefit, until after the creditors of their testator had been publicly notified to come in, and some of them had actually become parties by filing the vouchers of their claims. So far as this private act lends its aid in removing any disabilities or difficulties which had rendered it impracticable for these devisees, of themselves, to apply the estate of the deceased debtor to the payment of his debts, it may be permitted to stand; but it certainly cannot be suffered to operate so as to hinder or delay creditors in the recovery of their debts, any more than a mere voluntary mortgage, or sale made by an heir or devisee of himself, pending a suit against him, could be allowed to be of any avail, in preventing a then plaintiff creditor from obtaining a decree for a sale for the satisfaction of his claim.

It is clear, therefore, that this private act of assembly, so far as it has been presented as an obstacle to the relief prayed by this bill, can be of no avail, and must be regarded as utterly unconstitutional and void.

On taking a retrospective view of the various proceedings, which have been had, in relation to this estate, and the disposition which has been already made of some of it, for the benefit of the devisees and creditors of the deceased, it is sufficiently obvious, that, to facilitate the further progress of the court in this matter, it will be necessary to consolidate, and have them henceforth considered as one suit, covering all matters within reach of a creditor's suit, and of a bill filed by the legatees and devisees, for a distribution of the surplus after the payment of debts. And it is also obviously necessary, that these executors and trustees should, all of them, be called to an account. I shall therefore order a sale, consolidate the cases, and direct an account to be taken.

Whereupon it is *Decreed*, that the real and personal estate of *William Campbell*, deceased, yet remaining undisposed of, or so

(*k*) Co. Litt. 102; 1 Pow. Mortg. 547, note R.; Sugd. Vend. & Pur. 535; Calvert Parties, 101.

much thereof as may be necessary for the payment of his debts, be sold; that the trustee, if practicable, to sell the personal estate, and the real estate devised for that purpose, and the lands in Allegany county, in the first instance: and if sales of the said property cannot be effected, or the proceeds thereof should be insufficient, then he shall sell the remaining real estate of the deceased; that *John I. Donaldson* be appointed trustee, to make the sale, &c. And it is further *Decreed*, that the case of *Edward Campbell* and others, against *John McHenry*; and the case upon the petition of *Edward Campbell* and others, be consolidated with and made parts of this case. And it is further *Decreed*, that *John McHenry*, *Edward Campbell* and *John I. Donaldson* account, &c.

The trustee gave bond as required by this decree, and on the 18th of December, 1829, reported, that he had made some further sales of the deceased's estate, which sales were finally confirmed on the 27th of February, 1830. After which he reported, that he had, under the decree of the 12th of December, 1827, mortgaged a part of the estate of the deceased, which, no objection being made, was, on the 15th of June, 1830, approved; and on the 5th of May, 1832, he reported, that he had made some further sales, which were finally ratified, on the 6th of July, 1832. On the 7th of May, 1832, the auditor reported a statement of the claims of the creditors of the deceased, who had come in, and a distribution among them of so much of the testator's estate as had then, in various ways, come to the hands of the trustee. After which the trustee reported, that he had raised some further sums by mortgage, which, without opposition, was, on the 26th of May, 1835, approved. It appears by the proceedings under a petition filed in the same case on the 2d of March, 1836, that all the children of the testator *William Campbell* were then dead; and that the case had so abated.

ELLCOTT v. WELCH.

A bill filed by the holder of a vendor's lien, who has no interest in common with the creditors at large, cannot be treated as a creditor's suit; except on the petition of a general creditor for satisfaction out of the surplus.—The widow of the vendee can be endowed, under the act of assembly, only of that which remains after the vendor's lien has been satisfied.—An absolute judgment against an administrator is conclusive evidence of the sufficiency of assets to pay that debt; and

also a debt due to such administrator, for which he might retain ; which conclusive evidence must necessarily enure to the benefit of the heirs and devisees ; who, if made to pay, have a right, by substitution, to proceed on such judgment to obtain reimbursement.—The Court of Chancery cannot revise or reform a judgment of a court of common law in any way whatever.

THIS bill was filed on the 7th of November, 1825, by *George Ellicott* against *Joshua Warfield* and *Rachel Welch* the administrators, and *Derastus Welch*, *John Welch*, *Nicholas Welch*, *Rachel Welch* and *Howard Welch*, the infant heirs of the late *Nicholas Welch*, and *Warner Welch*, with whom the administratrix *Rachel* had intermarried. The bill states, that the plaintiff sold a parcel of land to *John Welch* ; which, according to the agreement entered into between them, was, when fully paid for, to be legally conveyed to him ; that soon after entering into this agreement, *John Welch* assigned his interest in the land to *Nicholas Welch*, who took possession of it, and paid a part of the purchase money ; that *Nicholas Welch* died intestate, leaving the defendants his heirs, and a widow, the defendant *Rachel*, who had since intermarried with *Warner Welch* ; that administration had been granted to the widow and *Joshua Warfield* of the personal estate which was wholly insufficient to pay the debts of the deceased ; and that the land was bound by a lien to the plaintiff for the payment of the balance of the purchase money.—Upon which it was prayed that the land might be sold to satisfy the said claim.

As against the widow and her husband, who, having been summoned, had failed to answer, an interlocutory decree was passed taking the bill *pro confesso*. The infant heirs, answering by their guardian *ad litem*, admitted the truth of the allegations of the bill. And the administrator, in his answer, also admitted the truth of the plaintiff's statement ; and prayed that the balance which might remain should be paid to him to be applied, by him, under the directions of the Orphans Court, to the payments of such debts as might be then due from *Nicholas Welch*, deceased, in consequence of the insufficiency of his personal estate. Upon this case, on the 14th of July, 1826, a decree was passed, in the usual form, directing the land to be sold ; under which it was sold accordingly, and the sale finally ratified on the 19th of February, 1827.

The widow, with her second husband, by petition, prayed to be allowed a portion of the proceeds of the sale in lieu of the dower to which she was entitled in the land sold. The plaintiff objected, that the claim was to his prejudice ; and therefore should not be allowed.

3d June, 1828.—BLAND, *Chancellor*.—The petition of *Warner Welch* and *Rachel* his wife having been submitted without argument, the proceedings were read and considered.

The object of the bill is to have the land sold for the payment of the purchase money due to the plaintiff; his claim therefore carries with it an equitable lien upon the land sold, which entitles him to a preference in satisfaction from the proceeds of the sale over all others; and consequently, the petitioner *Rachel*, according to the act of assembly, (a) can only be endowed of the equitable interest of her late husband, without prejudice to the plaintiff's claim; that is, of the surplus which may remain after that claim has been satisfied. But as it does not appear what is the amount of the surplus, if any;

It is therefore *Ordered*, that this case be and the same is hereby referred to the auditor with directions to state an account accordingly, allowing to the said *Rachel* out of such surplus, if any, two-thirteenths for and in lieu of her dower in the equitable interest held by her late husband in the lands in the proceedings mentioned.

After which, on the 29th of June, 1829, the auditor reported a statement distributing the proceeds, first in payment of the costs, commissions and expenses, next in satisfaction of the plaintiff's claim in full; and then the balance or surplus among the widow and heirs of the deceased. But the auditor suggested, that no notice appeared to have been given to the creditors of the deceased to exhibit their claims against the estate, as there should have been before any part of the balance was paid over to the heirs.

6th July, 1829.—BLAND, *Chancellor*.—This case having been submitted on the auditor's report without argument, the proceedings were read and considered.

The plaintiff founds his claim to relief on an equitable, or vendor's lien upon the real estate designated in the proceedings. He is here, in effect, as a mortgagee seeking relief against a mortgagor; but as a mortgagee, or the holder of an equitable lien has no common interest with the general creditors of the debtor, he cannot in his and on their behalf institute a creditors' suit. (b) Although this bill alleges, 'that the personal estate of the intestate will be greatly insufficient to pay his debts;' yet the plaintiff does

not claim as one having a common interest with the other creditors of *Nicholas Welch*, deceased ; or as one who was only entitled to obtain immediate satisfaction here out of his real estate in the hands of his infant heirs, upon the ground that his personal estate was insufficient or had been exhausted. There is, therefore, nothing in the pleadings, as they stand, which shews this to be a creditor's bill under which all the other creditors of the deceased should be notified to bring in their claims.

It is true, that this might have been converted into a creditor's suit ; and that this surplus distributed among these heirs, exclusive of the widow's share, might, before it was paid over to them, have been thus intercepted for the benefit of the general creditors of the deceased. But that could only have been done at the instance and on the petition of a creditor having a common interest with others, and on the ground of the insufficiency of the personal estate of the deceased ; (c) or on the application of one, who, from the peril in which he stood, had a right to be substituted for, and to be considered as such a creditor. As where an executor or administrator, who had paid away all the personal assets, was actually sued, and against whom judgment was likely soon to be recovered by a creditor of the deceased, petitioned to have the surplus applied to the satisfaction of such claims to which he was in danger of being made liable ; (d) or where a judgment had been obtained against the surety in a bond, such surety, before he had paid any part of the debt was allowed to sustain a creditor's suit here, on the ground of the insufficiency of the personalty, and to have the real estate of the deceased debtor sold for the satisfaction of his creditors, so as, in whole or in part, to save such surety harmless. (e)

(c) *Latimer v. Hanson*, 1 Bland, 51 ; *Fenwick v. Laughlin*, 1 Bland, 474.—
 (d) *O'Brien v. Bennet*, 1 Bland, 86, note.

(e) *ARTHUR v. THE ATTORNEY-GENERAL*.—This bill, filed on the 9th of December, 1800, by James Arthur and Daniel Perkins, states, that the late William Biggs died, leaving no known heirs ; that the plaintiff Perkins, had administered on his personal estate, which was insufficient to pay his debts ; that he left real estate for which an escheat warrant had been taken out, which the plaintiffs had caveated, (1785, ch. 78 ;) that the plaintiffs were bound as sureties of the deceased, and the debt not having been paid, they were still liable as such ; and that a suit had been brought and a judgment at law obtained against the plaintiff Perkins. Whereupon, it was prayed, that the real estate might be sold to pay his debts ; that his heirs, if any there were, might be notified, and that a subpœna might be issued to the attorney-general ; (1785, ch. 78 ; 1794, ch. 60, s. 6.)

Elizabeth Hopkins and Joseph George, the obligees, to whom the plaintiffs were bound as sureties for Biggs, were not made parties ; nor was Charles Hackett, who

But in this case there is no creditor before the court, having a common interest with others, and resting his claim to relief on the ground of the insufficiency of the personal assets of the deceased; nor any one who can have any pretence whatever to be considered as having a right to be substituted for such a creditor. The prayer or recommendation of the administrator *Joshua Warfield* introduces to the court no such party; and the suggestion of the auditor is altogether unauthorized.

Whereupon it is *Ordered*, that the statement as made and reported by the auditor be and the same is hereby ratified and confirmed, and the trustee is directed to apply the proceeds accord-

had taken out the escheat warrant, made a party; but it appears, that on the same day the bill was filed, Hackett filed a petition, praying that he might be permitted to perfect his title; which, however, does not appear to have been in any way noticed by the Chancellor.

An order of publication was passed as required by the act of 1794, ch. 60, s. 6, and published accordingly: and the attorney-general having been served with a subpoena, appeared and answered. Upon which the case was submitted, and on the 8th of January, 1803, a decree for a sale in the usual form was passed, which directed notice to be given to the creditors of the deceased to bring in their claims, and a sale was made and reported accordingly.

7th June, 1804.—HANSON, *Chancellor*.—*Ordered*, that the sale made by James Houston, as stated in his report, of the real estate of William Biggs, be absolutely ratified and confirmed; several of the creditors of the said Biggs having by writing, expressed their approbation of the said rule. *Ordered*, likewise, that the said trustee, for his whole trouble and expense incurred in the execution of his trust, be allowed the sum of £37 10s. 0d. Let the auditor of this court state the application of the money arising from the said sale, allowing the said commission and costs of suit, to be taxed by the register.

Under the notice to creditors to bring in their claims, Elizabeth Hopkins and Joseph George, with nineteen others, brought in their claims; amongst whom the auditor made and reported a distribution of the proceeds of the sale, as directed. The act of 1785, ch. 78, directs, in cases of this kind, that if the proceeds of the sale be 'not sufficient to pay the whole debts, the money arising from such sale to be equally distributed among the creditors in proportion to their debts, *without any preference*.'

7th September, 1805.—HANSON, *Chancellor*.—*Ordered*, that the principal money arising from the sale of the real estate of William Biggs, be applied according to the auditor's statement; and that the receipt in writing, of any person entitled agreeably to the said statement, shall be admitted, so far as the said person is entitled, in the room of so much money directed to be brought in by the original decree—and that any money paid or to be paid by the purchaser for interest, shall be divided in due proportion, amongst the persons entitled, agreeably to the said statement, to the principal.

Each creditor obtained his dividend of the proceeds of sale as of course, leaving a balance still due to Hopkins and George, for which the plaintiffs were liable to them as sureties.

ingly, with a due proportion of interest that has been or may be received.

William Gaither and *Joshua Warfield*, for themselves and in behalf of the other creditors of *Nicholas Welch*, deceased, on the 25th of August, 1829, filed their petition in this case, in which they stated, that the late *Nicholas Welch*, being indebted to *Gaither*, died leaving real and personal estate; that administration having been granted on the personal estate of the late *Nicholas* to the petitioner *Joshua Warfield*, he, *Gaither*, sued *Joshua*, and obtained an absolute judgment against him; and that *Joshua* being also the surety of the late *Nicholas*, he, *Gaither*, had moreover sued and obtained a judgment against him on that ground. Upon which it was prayed that the petitioners might be allowed to come in as creditors, &c.

26th August, 1829.—BLAND, Chancellor.—The case with this petition having been submitted without remark the proceedings were read and considered.

It is admitted, that the judgments which this petitioning creditor *Gaither* recovered against the administrator of the late *Nicholas Welch* were absolute. This admission is alone sufficient to preclude him from any claim upon the real assets in the hands of the heirs of the deceased debtor; because, such judgments are conclusive evidence of a sufficiency of personal assets in the hands of the administrator to satisfy the claim. And that too as well between such creditor and the heirs of the deceased debtor, as between such creditor and the administrator of the deceased debtor. Because, if, notwithstanding such a judgment, the creditor were allowed to recover against the heir, leaving the judgment as against the administrator unimpeached, and it surely cannot be revised, impaired, or reversed in a court of equity, then the judgment standing as conclusive evidence against the administrator of a sufficiency of assets, the heir must be allowed, according to the doctrine of substitution, to take the place of such creditor, and to reimburse himself by proceeding upon the judgment against the administrator. (f) Which would be, in effect, to compel the parties to have recourse to a singular circuitry of remedy; or to divest a judgment of some of its legal consequences; or to deter-

(f) *Clifton v. Burt*, 1 P. Will. 680; *Edwards v. Countess Warwick*, 2 P. Will. 175.

mine, that a judgment should have one kind of operation at law, and another in equity; or to hold that a plaintiff might, when it suited his purpose, and in some courts, insist, that a judgment, which he, himself, had caused to be entered up, should be deemed conclusive evidence of a fact; and yet that he might be permitted, for other purposes and upon other occasions, to insist that it should not stand in the way so as to prevent him, for his own benefit, from proving the non-existence of the very fact, of which he himself had voluntarily received it as the most satisfactory and conclusive evidence. (g) Equity follows the law, and in no respect with more satisfaction than in avoiding anomalies and incongruities. And besides, if the petitioner *Gaither*, had intended to controvert the fact of the sufficiency of the personal assets, he should have filed his bill here for the recovery of his claim; but, by suing at law, he tacitly waived that right, as against the heirs, unless a deficiency should be relied on and sustained as a defence by the administrator; and he is now precluded from doing so, by the nature of the judgments he himself has voluntarily sued for and obtained.

The other petitioner *Warfield*, as the surety of the late *Nicholas Welch*, might have filed a bill here against his heirs, on the ground of the insufficiency of his personal estate, to charge the realty with an indemnity to himself, *Warfield*, before he had paid the debt; also in behalf of the other creditors of the late *Nicholas Welch*; but having failed to do so, and having submitted to an absolute judgment against himself, as administrator of his principal, he can now have no such claim to relief. (h)

Whereupon it is *Ordered*, that the said petition be and the same is hereby dismissed with costs.

On the 6th of November, 1829, *William Gaither* and *Joshua Warfield*, for themselves and in behalf of the other creditors of the late *Nicholas Welch*, filed their petition in this case, in which they again stated the same facts which they had set forth in their former petition, and that those absolute judgments had been improvidently rendered, the personal estate of the deceased being then wholly insufficient to satisfy the claims against it; and that the petitioner *Welch* believed, that they would bind only a proportion

(g) *Dorsey v. Hammond*, 1 Bland, 472.—(h) *Arthur v. The Attorney-General*, ante 245, note.

of assets in his hands ; and, under that impression, he had made a distribution of them accordingly : that those judgments should be revised and reformed ; or, at least, that dividends of the real estate should be paid equal in amount to the personal estate paid after their rendition in discharge of other claims. And further, the petitioner *Warfield* alleged, that he himself was a creditor of his intestate to a large amount. Whereupon it was prayed, that the surplus might be applied in payment of all just claims against the estate of the late *Nicholas Welch*.

9th November, 1829.—BLAND, Chancellor.—The case on this petition having been submitted without argument, the proceedings were read and considered.

These petitioners *Gaither* and *Warfield*, presented their claim by a petition filed on the 25th of August last, which was disposed of by the order of the 26th of the same month ; and feeling still satisfied with the correctness of that order, it will be only necessary now to say why I deem the new matter with which the claim is by this petition connected, must be deemed altogether unavailable.

The petitioner *Warfield* states, that the judgments were rendered improvidently and from ignorance, on his part, of their legal effect and operation. If ignorance of law, to this extent, were to be considered as a sufficient foundation for a Court of Equity to interfere, there are few judgments of any court of common law, which a Court of Chancery might not be called upon to revise and reform. But this court can, in no case, revise or reform a judgment of a court of common law in any respect whatever ; and there are no such special circumstances of fraud, surprise, or mistake set forth in this petition, as can give this court jurisdiction to grant relief against those who, as heirs, creditors or parties may have a right to avail themselves of the effect and operation of the absolute judgments obtained against the petitioner *Warfield*, as the administrator of the late *Nicholas Welch*. (i) And, therefore, upon this ground, and for the reasons given in the order of the 26th of August last, this claim must be again rejected.

But the petitioner *Warfield* states, that he himself is a creditor of his intestate. If so, it is perfectly well settled, that he might have, at once, retained and applied of the assets, which came to his hands, so much as was sufficient to satisfy his own claim ; (j) and having this well known legal right, it must be presumed, that

(i) Robinson v. Bell, 2 Vern. 146.—(j) 1798, ch. 101, sub ch. 8, s. 19.

he had so retained to that amount; because, the absolute judgments against him were a tacit and conclusive admission, that he had assets sufficient to satisfy that as well as his own claim, which could only be satisfied by retainer in whole or in due proportion with others for which, suit might be brought. And since he made no defence on the ground of an insufficiency of assets to satisfy his own claim as well as that for which the suits were brought, those absolute judgments must be considered as alike conclusive evidence of a sufficiency of assets to satisfy both of them.

Whereupon it is *Ordered*, that the said petition be and the same is hereby dismissed with costs.

See this case, under the name of *Gaither & Warfield v. Welch's Estate*, reported in 3 G. & J. 259.

MACCUBBIN v. MATTHEWS.

A party may, as of course, withdraw any document, which he himself has voluntarily put upon file, for the purpose of having it authenticated.—Commissioners may summon a witness to attend before them; and the court will compel him to do so; but a commission should be issued so as to have the examination at a reasonable distance from the residence of the witness.

THIS bill was filed on the 26th of June, 1828, by *John Henry Maccubbin* against *Elizabeth Matthews, William D. Matthews, Mary E. Matthews, John E. Matthews, Jesse Matthews* and *John Hall*. It appeared, that the plaintiff had sold a parcel of land to *John Matthews*, the intestate of the defendant *Hall*, the late husband of the defendant *Elizabeth*, and the father of the other defendants, who were all infants; that the land described as lying within certain specified boundaries, was estimated to contain three hundred acres more or less; and was to be paid for at \$6 66 $\frac{2}{3}$ cents per acre; that upon that estimate, part of the purchase money was paid, and a bond given for the residue; and a bond of conveyance given by the vendor to the vendee; that afterwards a survey was made, and the tract was found to contain five hundred and thirty acres; that the bond given for the residue of the purchase money had been assigned to a certain *Nicholas Brice*, and was not then paid; and that the defendant *Hall*, as administrator, had taken possession of the effects of the intestate. Whereupon it was

prayed, that the plaintiff might obtain a decree for the sale of the land for the payment of the purchase money, and have such other relief as might be consistent with equity.

The defendant *Elizabeth*, put in her answer, and therewith filed, as an exhibit, the original bond of conveyance; the other defendants also filed their answers; to all which the plaintiff put in a general replication. Whereupon a commission was issued to the commissioners in Baltimore to take testimony.

After which the plaintiff, by his petition prayed, that, for the better proof of his bill, and that he might be the better able to substantiate his claim therein set forth, the register might be ordered to deliver to him the said original bond of conveyance.

23d November, 1829.—BLAND, Chancellor.—According to the rule and the general practice of the court, each party is entitled, as of course, without any special order for that purpose, to withdraw from the files any writing or document which he himself has placed there, or of which he may have made an exhibit and filed with his bill or answer, in order to have it proved under a commission to take testimony. Upon the ground, that each party may be safely entrusted in withdrawing and taking care of any documentary evidence which he had previously brought in as necessary to the support of his claim or defence; and which had not been ordered into court for safe custody; (a) or where it did not appear, from the peculiar nature of the case, that the court should have the power of so dealing with the instrument as to be reasonably sure of having it produced upon all occasions where its production might be necessary. (b) But the Chancellor cannot order a *record*, such as a bill, answer or deposition, out of the possession of the proper officer of the court, except in some very peculiar cases. (c)

Here, however, it appears, that the document called for by this plaintiff, has been exhibited by the defendants, as the instrument of writing given by him to the vendee, under whom they claim, and as the principal or only muniment of their title. The plaintiff, therefore, can have no occasion to have it authenticated; for having been thus admitted by the defendants it may be read against them by the plaintiff without proof; (d) nor is this a case in which

(a) *Webb v. Lord Lyvington*, 1 Eden, 8.—(b) *Frankland v. Hamden*, 1 Vern. 66; *Beckford v. Wildman*, 16 Ves. 438.—(c) *Anonymous*, 1 Ves. jun. 152; *Fauquier v. Tynte*, 7 Ves. 292.—(d) *Cox v. Allingham*, 4 Cond. Chan. Rep. 160.

he can, upon any ground, claim to have it taken from the file, and committed to his custody, for any purpose whatever. (e)

It is, therefore, *Ordered*, that the said petition be dismissed with costs.

The commissioners of Baltimore to whom the commission to take evidence had been issued, upon the application of the plaintiff, issued a summons in the following words :

‘*John H. Maccubbin v. Elizabeth Matthews, and others.*—In Chancery.’

‘To *Charles Waters, Henry C. Dunbar, and O’Neal Cromwell*; you are hereby summoned to attend at the office of *Benjamin C. Ridgate*, corner of St. Paul’s and Fayette streets, in the city of Baltimore, on Tuesday, the 22d day of December, instant, at 10 o’clock, A. M., to testify for the complainant in the above cause. By order of the commissioners, *John Carrere, jun.*, clerk, Baltimore, 8th December, 1829.’

Which summons *Charles Boour* made oath he had regularly served. After which two of those witnesses, having failed to attend, as required, the commissioners reported, that the plaintiff had represented to them, that the said witnesses, *Waters* and *Cromwell*, were material witnesses in the case; and that as he was otherwise remediless, prayed, that the court would direct an attachment to compel them to attend and testify.

1st January, 1830.—BLAND, *Chancellor*.—It is very certain, that this court has, at all times, been endowed with ample power to have brought before it any testimony, documentary or verbal, necessary to a just exercise of its jurisdiction, or which it may find to be necessary to aid any suitor in having taken and produced, as competent, pertinent, and material to his case. (f) And it appears, that, under the provincial government, and since, this power to enforce the production of evidence, for the benefit of its suitors, has been often exercised in a manner analogous to that pursued by the English Court of Chancery. (g) And, therefore,

(e) *Graves v. Budgel*, 1 Atk. 444; *Harris v. Bodenham*, 1 Cond. Chan. Rep. 143.—

(f) *Amy v. Long*, 9 East. 484; *Lupton v. Hescott*, 1 Cond. Chan. Rep. 138.—

(g) *Brassington v. Brassington*, 1 Cond. Chan. Rep. 233; *Bradshaw v. Bradshaw*, 4 Cond. Chan. Rep. 464; S. C. 5 Cond. Chan. Rep. 122; *Corsen v. Dubois*, 3 Com. Law Rep. 86; *Cowell v. Seybrey*, 1 Bland, 18, note; *Bryson v. Petty*, 1 Bland, 182, note; *Onion v. McComas*, ante 83, note; 1 Newland’s Chan. Pra. 273.

Charles, &c.,—To our trusty and well beloved Lieutenant Colonel Henry Darnall and Colonel Henry Jowles, greeting: *Whereas*, by a final order and decree of our

the provisions of the late act of assembly professing to provide compulsory process in such cases, (h) can only be regarded as a mere affirmance of the pre-existing powers of the court.

But, in enforcing the attendance of witnesses before commissioners, the court will so exercise its authority as to leave to the suitor every benefit he can, with propriety, ask, without imposing upon the witness any unnecessary trouble or expense. It has long been the practice to allow suitors to have commissions to take evidence directed to commissioners most convenient to the residence of the witnesses; so that they may not be compelled to travel any unreasonable distance to give their testimony. And, therefore, instead of forcing a witness to attend at a great distance from his home, as for example, from his residence on the Eastern Shore, to attend commissioners sitting in Allegany, the party would be directed to have a commission to some more convenient place within a reasonable distance from the habitation of the witness; without regard, however, to the place being within the same county or not, as the jurisdiction of the court extends indiscrimi-

High Court of Chancery, remaining upon record in our said court, it is ordered and appointed you to audit, state, and examine the accounts and other matters between Thomas Bland, and Damoras his wife, complainants, and Edward Dorsey, and Sarah his wife, defendants, depending in this court, or at law, and stopped by injunction of this court, at such time and place as you shall appoint; which said order of our said court is hereunto annexed. We, willing that justice should be done, and that all decrees and orders of our said court should be exactly performed, do hereby strictly charge and command you, and either of you, that the said parties, complainants and defendants, you call before you at such time and place, as to you shall seem meet, and the said accounts and other matters, between the said parties, that you audit, state and examine, according to the order of our said court; and that a report of your proceeding herein, that you send to us under your hands and seals into our Court of Chancery, the tenth day of February next, wheresover we shall then be, and this our precept. Witness ourself at our city of St. Maries, the 18th day of December, in the 5th year of our Dom. &c., Annoque Domini 1679.—*Chancery Records, lib. C. D. fol. 254.*

Charles, &c.—To Andrew Toulson and William Currier, of Cecil county, greeting: We command you, that, all excuses set apart, you be and personally appear before James Stavely and James Frisby, our commissioners, by virtue of our commission to them directed, out of our Court of Chancery, at such certain day and place as our said commissioners shall make known unto you, that they may then and there diligently examine you, upon certain interrogatories, on the part of John Browning, complainant against George Oldfield and Andrew Peterson, defendants; and further to do and receive what our said court shall consider of in that behalf; and this you may in no wise omit under the pain of ten pounds sterling a piece: and have you there this writ. Witness, &c. 26th of May, 1681.—*Chancery Records, lib. C. D. fol. 299.*

(h) 1824, ch. 133.

nately over the whole territory of the state. (i) But here no objection of this kind appears to have been made by these witnesses; and, therefore, they must be ordered to attend as prayed.

Ordered, that the said *Charles Waters* and *O'Neal Cromwell*, attend before the said commissioners at their office in the city of Baltimore, on Monday, the 18th day of the present month, and from time to time thereafter, as the said commissioners may appoint, then and there to answer, on oath or affirmation, all such lawful questions as may be propounded to either of them, touching the said matter in controversy; and, on failing to do so, that they or he who shall so fail, be forthwith thereafter, brought before this court to answer the said contempt. Provided that the said commissioners give notice, as usual, to the opposite party, of the time and place of taking the said testimony. And it is further *Ordered*, that the register issue an attachment as prayed to enforce obedience to this order.

After which, these witnesses attended, their depositions were taken, and the commission was returned, together with their and other testimony. Upon which the case was heard; and on the 30th of April, 1833, it was *Decreed*, that the administrator should pay to the plaintiff the balance of the purchase money, other than that due upon the bond, &c.

THE BANK v. DUGAN.

A creditor's suit against an executor alone.—A creditor permitted to come in, on petition, before the defendant had answered.—Where a plaintiff has an interest in books, which the defendant admits to be in his possession, he may be ordered to produce them; but they must be called for by petition, not by way of exception to the defendant's answer.—The answer overrules the plea.

THIS bill was filed on the 22d of May, 1829, by *The President and Directors of the Bank of Maryland* against *Cumberland Dugan*, surviving executor of *James Clarke*, deceased. The bill charged, that the executors of the deceased by their improper, negligent, and illegal conduct had so managed the assets of the deceased, that a large amount of them had been wasted; in consequence of which his creditors had not been paid. Whereupon

(i) Anonymous, 4 Mad. 463; *Dorsey v. Hammond*, 1 Bland, 465.

it was prayed, that, for the benefit of themselves and the other creditors of the deceased who might be permitted to come in, the surviving executor might be ordered to account; that the creditors might be paid, &c.

After which *Elizabeth Blair*, executrix of *William Blair*, deceased, by her petition stated, that she had, at September term, 1824, of Baltimore County Court, recovered a judgment against the executors of *Clarke* for the sum of \$1000, with interest from the 23d of May, 1814, and costs, to bind assets; which debt had not been paid. Whereupon she prayed to be admitted to come into this creditors' suit as a co-plaintiff, paying a proportion of the expenses, &c.

23d October, 1829.—BLAND, *Chancellor*.—It has long been the practice to allow a creditor to come in at any time after a creditor's bill, such as this is, has been filed; and before as well as after a decree to account has been passed before the assets have been actually distributed. (a) Therefore it is *Ordered*, that the said *Elizabeth Blair* be and she is hereby admitted as a party plaintiff in this suit upon the terms prayed.

On the 8th of December, 1829, the defendant put in an answer purporting to respond to all the matters of the bill; and then adding thereto a plea of a prior suit and decree, in the Orphans Court of Baltimore County, embracing the same matter in bar of this suit.

To this answer and plea the plaintiffs took the following exceptions; *first*, for that the said defendant has not admitted or denied, that the said executors discounted upwards of \$20,000 in notes and other securities, or what other amount, which the said executors had received for the sale of their testator's property, a few days, and when, before the bond of said defendant was credited to said *Clarke's* estate, as stated in the said complainant's bill. *Second*, for that said defendant has not stated when and at what time each and all of the sums of money received and paid by him, and by said executors were received and paid; but has referred to the several accounts of the executors returned to the Orphans Court, and exhibited with said complainants' bill, to shew when the amounts were paid and received, whereas said accounts do not shew when said several amounts were paid or received. *Third*,

because said defendant has not brought into this court the books of account of said *James Clarke*, nor offered to do so; nor has he produced and brought into this court, nor offered to do so, the bond of said defendant to said *Clarke*; and has assigned no reason for his omission to do so. The plaintiffs then go on to state six other exceptions to the sufficiency of the answer; and then they say *tenth*, because the said answer is accompanied by, or incorporates a plea which covers the whole matter of said bill of complainant; and which, if good and sufficient, would render said answer incompatible, expensive, and unnecessary. And is otherwise, and in other respects evasive, and insufficient. Whereupon an order was passed appointing a day for hearing these exceptions. After which the matter was brought before the court.

14th January, 1830.—BLAND, *Chancellor*.—The exceptions to the answer of the defendant standing ready for hearing, and having been submitted without argument, the proceedings were read and considered.

In general, wherever a plaintiff has an interest in any books or papers, which a defendant, by his answer, admits to be in his possession, he may be ordered to produce them on petition of the plaintiff, specifying what books or papers are wanted. (b) But, in this instance, the plaintiffs, by their third exception, object to the sufficiency of the answer; because, the defendant has not brought into court the books of *James Clarke*, and the bond of the defendant. So far as the bill calls for any disclosures respecting those books, or that bond, which have not been answered, the answer may be deemed insufficient and exceptionable; but, although the production of those books and papers is a part of the discovery, which this defendant, on his submitting to answer is bound to make, yet the taking of exceptions to his answer, because of his not producing them, is not the mode in which a defendant may be compelled to produce books and papers for the benefit of the plaintiff in the progress of the case, or at the final hearing; the application to have any such documents, as a defendant admits to be in his possession or under his control, brought in, must be made by petition. (c) This third exception must therefore be overruled.

The defendant having submitted to answer, must, according to the established rule, answer fully as to every fact in any way mate-

(b) *Ringgold v. Jones*, 1 Bland, 90, note; 2 Mad. Pr. Chan. 390; 1 Newland, Chan. 199.—(c) 1 Harris. Pra. Chan. 322; *Wagram Discovery*, 14.

rial and pertinent to the plaintiff's case as set forth in his bill. (*d*) But this defendant, after having thus submitted to answer, has offered a plea, covering the whole ground of his answer, in which he pleads and relies upon a decree, in another tribunal, upon the same matter, as a bar to this suit. A plea must always rest upon that which shews, that the defendant should not be compelled to answer at all; and therefore an answer to any thing relied on by way of plea overrules the plea; because, if a defendant answers to the matter covered by his plea he thereby waives his plea; and, hence it is an established rule, that where a defendant pleads and answers to the same case, the answer overrules the plea. Consequently, even supposing this plea to be good and available if it had stood alone, it is clearly overruled by the answer to which it has been subjoined. (*e*)

Whereupon it is *Ordered*, that the third exception of the plaintiffs to the answer of the defendant be overruled; and that all the other exceptions of the plaintiffs thereto be sustained; and that the defendant pay unto the plaintiffs all the costs of the said exceptions including a solicitor's fee to be taxed by the register. (*f*)

And it is further *Ordered*, that the said plea of the defendant be overruled; and that the defendant pay unto the plaintiffs, the sum of £5 current money, and the costs of the said plea to be taxed by the register, and be in contempt until the said sum of money and costs be fully paid. (*g*)

And it is further *Ordered*, that the defendant make a full and sufficient answer to the bill of complaint on or before the 20th day of February next.

The defendant answered as required by this order, to which the plaintiffs having put in a general replication; and commissions having been issued and returned with evidence taken under them, the case was, by consent, referred to the auditor, with directions to state accounts; and notice having been given by advertisement in the newspapers, to the creditors of *James Clarke*, deceased, to file the vouchers of their claims, the auditor made a report accordingly, which was confirmed, &c.

(*d*) *Mazarredo v. Maitland*, 3 Mad. 69; *Salmon v. Clagett*, post.—(*e*) *Cottington v. Fletcher*, 2 Atk. 155; *Blacket v. Langlands*, Anstr. 14; *Forum Rom.* 58; *James v. Sadgrove*, 1 Cond. Chan. Rep. 3; *Hannah K. Chase's Case*, 1 Bland, 217.—(*f*) 1820, ch. 161, s. 8.—(*g*) 1785, ch. 72, s. 25.

THE RAIL ROAD v. HOYE.

All common warrants must be lodged with the principal surveyor, and entered in the manner prescribed; otherwise surveys made under them, will be deemed void as against others regularly made.—No positive rule, or law can be suffered to be made the instrument of fraud.—Where there is a material difference between the location in the surveyor's book, and the actual survey, the latter is taken as a virtual abandonment of the former.—In caveat cases, there being no appeal, it is usual, where there is a reasonable doubt, to let the patent go, so as thereby, in effect, to give the parties the benefit of an appeal.

THIS case arose in the land-office upon cross-caveats, the one by *The Baltimore and Ohio Rail Road Company*, as the holders of a certificate of a tract of land, called *Clara Fisher*, against the issuing of a patent on the certificate for the tract of land, called *River's Bend*; and the other by *The Chesapeake and Ohio Canal Company*, as the assignee of a certificate obtained by *William W. Hoyer*, of the tract of land, called *River's Bend*, against the issuing of a patent on the certificate of the tract of land, called *Clara Fisher*.

It appears, that about the 23d of May, 1828, the surveyor of Allegany county, was requested to attend on the Potomac river, near the mouth of Sidelinghill creek, to execute some warrants held by *John V. L. McMahon*, for the use of *The Baltimore and Ohio Rail Road Company*; that the surveyor, being otherwise engaged, sent his deputy, who made the survey, as required, under a common warrant, of the tract called *Clara Fisher*, on the 25th day of May, 1828. But the warrant not having been put into the surveyor's hands until four days after, that is, on the 29th of May, he therefore dated the certificate of survey for *Clara Fisher* on that day, and not of the day when the survey was actually made.

On the other side, it appears, that *William W. Hoyer*, under whom *The Chesapeake and Ohio Canal Company* claim, as his assignee, having a special warrant, placed it in the hands of the surveyor of Allegany county, 'which warrant, the surveyor says, was by me, on the 28th day of May, 1828, located for the said *William W. Hoyer*, in a book kept by me for the purpose, on the bank of the Potomac river, below and adjoining to the lines of a tract of land, the property of *Mr. Lantz*, which tract of land lies at the mouth of the Devil's Alley run; and to extend down from the lines of said *Lantz's* land with the meanders of the Potomac river to the lands formerly belonging to *McQueen*, and now said to belong to *Mr. Hughes*, and to extend out from the river for quantity.'

And the surveyor further says, 'I certify, as surveyor of Allegany county, that I have carefully surveyed for and in the name of him, the said *William W. Hoyer*, all that tract or parcel of land lying and being in Allegany county aforesaid. Beginning about twelve feet south from an ancient elm tree, standing on the bank of the Potomac river,' &c. Thus going on to describe the lands which had been so specially located in the surveyor's book, by courses and distances, to be held by the name of *River's Bend*, which courses, distances, and quantity of the tract, called *River's Bend*, on comparison, appear to be precisely the same as those of the tract of land, called *Clara Fisher*; which conclusively shews, that those two names do not designate different tracts, but identically the same lands.

22d January, 1830.—BLAND, *Chancellor*.—These cross-caveats standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

By the second article of the rules and orders of the 15th of April, 1782, for the direction of surveyors, it is declared, that 'upon receipt of any common warrant you are to note down in a book, to be kept by you for that purpose, the time of your receiving it, the quantity of acres included therein, the date thereof, and at what place, the person who obtains it, locates the same; and, when any other person desires to locate a warrant on land which some other person has already entered a warrant to affect, you shall, if required, produce your book of entries, and shew him that entry or location, if such demand be made at your house, or any other place where your book of entries shall be.' And by the nineteenth article of the same set of rules, it is declared, that 'you are not, after the receipt of these instructions, to suffer any person to run out the lines of or execute any warrant for you, unless an assistant properly qualified; and to prevent all disputes about the priority of entries, or locations of land, no assistant shall presume to receive or enter the location of any warrant whatever, that power being solely vested in the surveyor.' (a)

These regulations appear to have been taken almost verbatim from those given to surveyors on the 5th of December, 1768. (b) And yet it seems to be admitted, notwithstanding they have been so long in force, that there has been hitherto no adjudication in the

land office, or none now to be found there on questions arising out of any state of things similar to that presented by these caveats.

It was contended, on the part of the *Rail Road Company*, that an assistant surveyor is only prohibited from receiving and entering the description of the location of a common warrant; but that he may receive the warrant and execute it without its being first delivered into the hands of the surveyor.

But it is clear, that all common warrants must be first lodged with the principal surveyor of the county before his assistant can be permitted to execute them in any way whatever. The second article explicitly requires four things to be entered and noted in the surveyor's book in all such cases. *First*, the time of receiving the warrant; *second*, the quantity of acres included therein; *third*, the date thereof; and *fourth*, at what place the person who obtains it locates the same. The three first of these notations are peremptorily required in all cases; but the last, it is evident, from its nature, and the express language of the rule itself, can only be made 'when any person desires to locate a warrant.' The restriction imposed upon assistant surveyors, by the nineteenth article, in the clearest terms, embraces all four of these notations; it is declared, that 'no assistant shall presume to receive or enter the location of any warrant whatever.' The one book in which all these entries are directed to be made, is to be kept by the surveyor; he alone, therefore, can make them, and produce that book to all other holders of warrants, who may come to have them entered and located on lands to which they may wish to acquire a right of pre-emption from that date, by giving and entering a special description of them. The obvious and expressly declared intention of these regulations is, 'to prevent all disputes about the priority of entries or locations of land.' But this object could not be attained, if the principal and assistant were each allowed to receive entries and locations, each of which was to be considered as equally available; nor could any one ascertain, from a view of the books and proceedings of either the principal or assistant surveyor alone, whether any other person had already entered a warrant to affect the land he wished to obtain.

I am therefore, satisfied, that although every survey must be dated on the day on which it was actually made; yet, in this instance, the survey of *Clara Fisher*, having been improvidently and erroneously made by the assistant, before the warrant had been lodged with and properly noted by the principal surveyor in

his book, must be considered as void and unavailable as against all special entries and surveys made regularly and *bona fide* before that time. (c)

But these regulations, made, in this respect, with the avowed intention of preventing disputes, ought not to be allowed to be so applied as, in any manner, to work that very mischief they were designed to prevent. Equity will not suffer any rule or legislative enactment, however positive, to be itself perverted into an instrument of fraud; or to be so used as to give any one, not ignorant of the facts and the bearing of the rule, an unjust and unfair advantage. The great statute of frauds itself is always so construed and applied as to prevent its being used as the means and cover of fraud. (d)

The intention of these rules is to give a right of pre-emption to him who should first, in the manner prescribed, designate the land he proposed to purchase. The claimant of *Clara Fisher* had proceeded erroneously; and, because of that error, his right of pre-emption would, as against all other *bona fide* purchasers, be postponed from the 25th to the 29th of May. But, on seeing the exact sameness of the surveyor's description of *River's Bend*, the location of which was made in the surveyor's book on the 28th of May, with that of *Clara Fisher*, it seems to be difficult to resist the conviction, that the claimant of *River's Bend*, was fully apprised of the previous survey of *Clara Fisher*; that he availed himself of the information it afforded, and designed to take an unfair advantage of the erroneous manner in which it had been made. Under such circumstances, to give the certificate of *River's Bend* a priority over that of *Clara Fisher*, would be to make these rules themselves the instruments of fraud. It would be like allowing a subsequent purchaser, with full notice, to avail himself of a defect in a conveyance, or of the statute of frauds in opposition to a fair, equitable, and known right; which would be contrary to all the principles of equity in this respect, and has never been permitted in any case whatever. (e)

(c) *Wilson v. Mason*, 1 Cran. 100.—(d) *Mestaer v. Gillespie*, 11 Ves. 627; *Fermor's Case*, 3 Co. 77.

(e) *SEWARD v. HICKS*, 1718.—It appearing to the court, that George Seward had a warrant from the late lord proprietary,—that Thomas Smithson, upon very fraudulent allegations, had obtained a special warrant to resurvey the land in the bill mentioned, and patent granted thereupon,—it is therefore *Decreed*, that Thomas Smithson's patent for the lands in the bill mentioned, be vacated, and that the com-

But it may be, that the claimant of *River's Bend*, at the time he made his location in the surveyor's book, had not any notice of the erroneous survey of *Clara Fisher*; because that location is in

plainants have a right to the said patents for the said lands; and that the defendant do surrender the said patent unto his lordship's land office, to be vacated accordingly, with costs.

The said patents having been brought into court as directed,—

14th August, 1719.—*Ordered*, that the said patents be cancelled; which was done by tearing the seals off in open court: and *Ordered*, that a certificate thereof be made and sent to the provincial court, in order for their being noted in the records thereof.—*Chancery Proceedings, lib P. L. fol. 419, 445.*

THE ATTORNEY-GENERAL v. BIGGS.—This information was filed on the 9th of August, 1796, by the attorney-general, at the relation of Richard Winchester and James Winchester, against William Biggs. Its object was to have a patent vacated, which had been obtained by the defendant. The defendant answered; a commission was issued, under which depositions were taken and returned,—upon all which the case was brought before the court.

28th February, 1801.—HANSON, Chancellor.—The said cause standing ready for hearing, and coming on to be heard, the bill, answer, exhibits, depositions, and all other proceedings, were by the Chancellor read, and the arguments of the counsel on each side were by him heard and considered.

The complainants apply to this court to be relieved against a patent obtained by the defendant, on the ground, that at the time of obtaining it, he had had notice of the equitable title of Henry Zolf, to part of the land contained in the said patent, which part had been comprehended in a certificate of a tract of land called *The Resurvey on Stoney Ridge*, surveyed for the said Zolf, which the complainants are entitled to by an assignment from Norman Bruce, to whom the said Zolf had assigned, &c.

The defendant in his answer, expressly denies, that before obtaining his patent, he had received notice of the said equitable title; and it is by no means clear, that, agreeably to the rule established in this court, his answer can be considered as refuted. But it is perfectly clear that Norman Bruce, who knew of the defendant's proceeding to obtain his patent, and in whom the said equitable title was at that time vested, permitted him to obtain his patent without making any objection, on account of the said equitable interest; although he opposed the said Biggs on other grounds, and actually obtained an order for the correction of Biggs' certificate, as it originally was returned. Bruce then, under whom the complainants' claim, by another established rule of this court, is to be considered as having forfeited all title to the aid of this court, on the ground of notice. And the complainants surely cannot be considered in a better situation than they would be in, if he had not made the assignment,—and, claiming under him, they ought to have made a full investigation of the circumstances attending his title, before they filed their bill. In short, whatever would have been decreed between the defendant and Bruce, in case Bruce had not assigned to them, is now to be decreed between them and the defendant.

Decreed, that the bill of Luther Martin, attorney-general, at the relation of Richard and James Winchester against William Biggs, be and it is hereby dismissed; that the said defendant William Biggs, be also hence dismissed; and that the said Richard and James Winchester do pay unto him the costs, by him sustained, in the defence of their suit against him, amounting, as taxed by the register of this court, to the quantity of three thousand eight hundred and seven pounds of tobacco.

general terms, and might have been fairly and properly intended to embrace the same vacancy, without any knowledge, at that time, of the survey of it under the name of *Clara Fisher*. And, besides, if the location of *River's Bend*, made in the surveyor's book, corresponds fully with the survey of it, then the survey is such a following up of the right of pre-emption acquired by the location as will give date, to the perfected legal title, by relation, from the date of the location in the surveyor's book; but if it does not so correspond, and there should be found any essential discordance between the location in the surveyor's book, and the actual survey, then the perfected legal title of *River's Bend*, can only be carried back to the 5th of June, the date of the actual survey, and not to the 28th of May, the date of the location. (f) There is, therefore, room to doubt, whether the claimant of *River's Bend* made the location in the surveyor's book with a full knowledge of the previous erroneous survey of *Clara Fisher*; and also whether the survey does, in fact, essentially conform to the special location made in the surveyor's book.

The decision of the Chancellor on a caveat in the land office is final, without appeal; and therefore, it has been the practice, in all cases of just doubt as to facts, or where a matter of much importance or difficulty presents itself, which can be left open after a patent shall have been issued, to permit each party to perfect his legal title, so as to allow the matter to be brought either before the Court of Chancery by a *scire facias*, or information to vacate the patent, or before a court of common law in an action of ejectment, or otherwise; and thus give to the parties the benefit of a more full and satisfactory investigation, and a final decision by the Court of Appeals in some one or other of those modes; and so virtually and in effect allowing them the benefit of an appeal as in ordinary cases. (g) For these reasons I shall allow each of these parties to obtain a patent.

Whereupon it is adjudged and *Ordered*, that each of the caveats before mentioned, be and the same is hereby dismissed; each party to pay his own costs.

(f) *Cunningham v. Browning*, 1 Bland, 311, 325.—(g) *Johnson v. Hawn*, Land Hol. Ass. 417.

CONTEE v. DAWSON.

The plaintiff may set the case down for hearing on bill and answer; but, in doing so, he admits the truth of every fact set forth in the answer.—Where an application is made, grounded on admissions in the answer, for an order on the defendant to bring money into court, the whole of his answer must be taken together and for true. An order confirming an auditor's report is a judgment of this court, final in regard to the matter to which it relates.—The foundation for an order to bring money into court, must be found in the direct progress of the case, and be such as is not open to be removed or explained away.

No direction in a will, nor any mere agreement to refer a controversy to arbitration can oust the proper courts of justice of their jurisdiction in the case.—There may be cases, where the bringing of a suit by a legatee is prohibited, with a bequest over, that the bringing of a suit will be a forfeiture.—It is sufficient, that the husband alone be made a party, to shew, that he has obtained satisfaction for the chose in action of his wife.—The answer of a defendant, resident out of the state, is a judicial record of this state, and must be authenticated accordingly as such.—In accordance with the spirit of the federal constitution, it is proper to go as far as may be safe, in giving credit to authentications coming from other states of the Union.—An answer, by consent of the plaintiff, may be received without being sworn to; and will be allowed to have full effect as regards co-defendants.—A party cannot avail himself of proof, in regard to any matter not alleged.—An executor must expressly aver an insufficiency of assets, otherwise he cannot prove it, and so avail himself of the fact.

How and when, under the peculiar expressions of a certain will, the legacies thereby given will vest.—A trustee held liable for all the consequences of a violation of his trust.—Those who have only a possible, or expectant interest in a legacy, can give to a trustee no direction as to its disposition.—Those who mislead or practise a fraud upon a trustee, can claim nothing of him.—The court must decree between co-defendants, so as to close the case.—Contingent legacies ordered to be brought in and invested, to await the contingency.

Where a sum is directed to be invested, and the investment is given to one for life, with remainder over, the interest which accrued before the investment, was held to be a part of the sum directed to be invested.—Where it becomes necessary to determine the day on which an event happened, and the proof only designates a space of time within which it happened, the middle of that space is assumed as the day on which it took place.

THIS bill was filed on the 15th of November, 1824, by *Edmund H. Contee*, and *Eleanor* his wife, and *Josias Hawkins*, and *Caroline A.* his wife, against *Eleanor Dawson*, *Philip A. L. Contee*, *Elizabeth Clerklee*, *Margaret Clerklee*, and *Sarah E. Clerklee*, for the purpose of recovering a legacy given by the late *Ann Russell*, of England, to the children of *Margaret Russell Clerk*, which the plaintiffs alleged had come to the hands of the defendant *Eleanor Dawson* as executrix of *William Dawson*, the deceased, who was the surviving trustee.

The several defendants answered. And the executrix *Eleanor Dawson*, in her answer filed on the 27th of September, 1825, ad-

mitted, that the legacy had been given as stated ; that it had been received and invested by the trustees ; that her testator had been the surviving trustee ; that he, as such, believing he had the proper authority to do so from the parties interested, had made sale of the English stock, in which the legacy had been invested, and had the proceeds, amounting to \$8,273 33, remitted to him here ; and that, on the 24th of March, 1819, he invested \$3,828 88, part thereof, in stock of *The City Bank of Baltimore* ; and the further sum of \$4,444 44, other part thereof, he had loaned to *James Clerklee*, on a mortgage of real estate ; and the residue, amounting to £212 0s. 0d., sterling, remained in the hands of *Wentworth, Chaloner & Co.*, of London, bankers of her testator, who claimed a right to retain it in discharge of a debt due from him. ‘ That she has not yet been able to settle up the estate of her testator, and that there are considerable debts now due to the same which are still unpaid ; and that the assets now in her possession are insufficient to discharge the debts due by the testator.’ Various other matters were set forth and relied on in this answer which it will be unnecessary to notice here, as all the material allegations of the parties, and the circumstances of the case are fully stated by the Chancellor in his opinion.

The plaintiffs by their petition alleged, that the testator of the defendant *Eleanor Dawson*, had been a trustee for the benefit of them and others interested in the legacy ; that as such he had received £2,406 14s. 2d. sterling, and withheld it from them, as did the said *Eleanor* since his decease ; that the said *Eleanor Dawson* had, under oath, settled a final account in the Orphans Court, whereby there appeared to be a balance over and above the payment of debts of \$13,357 44. But by the account so referred to and exhibited with the petition, headed as ‘ the first account ’ of this executrix, passed on the 22d of January, 1823, the concluding allowance in which is in these words : ‘ Retained by this account-ant, being the residue of the deceased’s estate, according to the last will and testament of the deceased, \$13,357 44.’ Whereupon it was prayed, that the defendant *Eleanor Dawson*, might be ordered to bring that sum into court to await the final decree.

On the 27th of February, 1826, it was *Ordered*, that she bring in that sum of money as prayed, on the 3d of April then next, or shew cause ; provided a copy be served, &c.

On the 13th of July, 1826, *Eleanor Dawson* filed her answer, without oath, to this petition, shewing for cause, that the plain-

tiffs have no interest in the money called for; that the trustees, of whom her testator was the survivor, were only to be held answerable for gross negligence; and that he had transferred the fund from England to this country and invested it here as stated in her answer to the bill; in doing which he had the assent of those interested, and was guilty of no neglect or default; that she had not assets sufficient to pay the debts of her testator; and protesting against the right of the plaintiffs to travel out of the admissions in her answer to their bill; she referred to her petition to the Orphans Court, and to an order passed on the 10th of July, 1825, allowing her account to be opened for correction, and for rendering a further account, under which authority she had accordingly passed a second account on the 28th of December following, in which she charged herself with some additional receipts and the sum of \$13,357 44 retained, as mentioned in her first account; and then obtained an allowance for cash, as per account proved and passed, to the amount of \$17,777 78; and several other smaller items; and that she was only bound to pay away the assets of her testator as they came to her hands in the due course of administration.

By agreement, the hearing of the matter of this petition of the plaintiffs had been postponed to the 13th of July; but was not brought before the court until some time after.

6th September, 1826.—BLAND, *Chancellor*.—The petition of the plaintiffs standing ready for hearing, the solicitors of the parties were fully heard and the proceedings read and considered.

Having lately had occasion maturely to consider the nature of an application to order money to be brought into court before the final hearing, (a) it will be here unnecessary to give any further explanations in regard to it. The counsel for the petitioners seemed to think, that the court had, in that case, gone further with the doctrine than had been done in any of the English cases; but, in what particular is not perceived. The English cases are grounded upon an interest in the plaintiff, and an admission in the answer itself, or an admission by reference to a schedule, or to books or documents; or upon an auditor's report confirmed; because the confirmation of such a report is a judgment of the court. In the late case in this court, the admission was accompanied by a reference to a deed, the construction of which belonged to the court,

(a) *McKim v. Thompson*, 1 Bland, 155.

and which was found to be unambiguous; and to leave no room for the introduction of proof as to its true intent and meaning.

It is a general rule, that a plaintiff may, at any time, without or by withdrawing his general replication, set the case down for final hearing, on bill and answer. But if he does so, he thereby necessarily admits the truth of all the facts set forth in the answer; as well those stated as directly responsive to the bill, as all those new facts and circumstances, pertinent to the matter in controversy, which have been introduced into it by way of avoidance, or as a defence. The reason and utility of this rule are obvious. The plaintiff cannot be permitted to deprive the defendant of the means of sustaining his defence by proof; but if he admits the truth of all the facts alleged by way of defence in the defendant's answer, he does not do so. Because a defendant cannot be expected or allowed to make his defence stronger, or better than he himself has stated it; and, therefore, if the plaintiff admits the truth of all those facts set forth as constituting that defence, the defendant can have no cause to complain, nor any pretext for asking to be indulged with any further delay to the prejudice of the plaintiff; since the collecting of proofs in such case must be altogether unnecessary. (*b*)

So, in cases of this kind, where the order is proposed to be grounded on the admissions of the defendant. The truth of all the facts alleged in the answer must necessarily be conceded; because the defendant cannot have his answer garbled, or be deprived of the means of sustaining his defence by proof, if the facts alleged by him are denied; and because it is only by the plaintiffs' granting the truth of the facts alleged by way of defence, that it is rendered wholly unnecessary to adduce proof; and the case becomes so situated, as to be susceptible of being fairly and at once presented to the court, upon facts not liable to be contradicted or explained away at the hearing.

From some expression which fell from the counsel, in the course of the argument, I deem it proper, however, to remark, that in declaring, that all the allegations of the defendant's answer, in cases of this sort, must be taken to be true, I mean the allegations of pertinent facts, out of which legal or equitable principles may

(*b*) *Grosvenor v. Cartwright*, 2 Ca. Chan. 21; *Barker v. Wyld*, 1 Vern. 140; *Wrottesley v. Bendish*, 3 P. Will. 237, note; *Legard v. Sheffield*, 2 Atk. 377; *Wright v. Nutt*, 3 Bro. C. C. 339; *Beam's Orders*, 29, 180; 2 Ev. Potheir Ob. 137.

arise, not any mere matter of opinion or idle assertion. In the case before alluded to, (c) the party alleged; *first*, the validity of the deed; *second*, the receipt of the money under the deed; and *third*, that the intention of the deed was, that he should hold the money so received. The two first of those allegations stated, and admitted the truth of the facts upon which the judgment of the court was founded; and the third amounted to no more than an expression of the defendant's opinion of the intention of the deed, which being erroneous, was therefore passed over unnoticed. But, although parties may be indulged in a brief expression of their opinions as to the law arising out of the facts they set forth; and the doing so may, in many cases, be received as a useful indication of the objects they aim at; yet there is no absolute necessity, in any case, to make any statement or allegation as to the legal consequences of any facts; since it is the peculiar and exclusive duty of the court to pronounce what is the law arising out of any combination of facts which may be regularly brought before it. In this case, and at present, all the allegations of fact contained in the answer of *Eleanor Dawson*, must be taken to be true, as well those which are immediately responsive to the bill, as those which introduce new facts by way of avoidance and defence.

The petitioners, however, assuming a view of the answer, in relation to the matter now under consideration, which they assert is the correct one, contend, that all the admitted facts necessary to lay a proper foundation for the desired order, are to be found in the answer of *Eleanor Dawson*, except those set forth in the account settled by her with the Orphans Court, a copy of which is exhibited as a part of their petition. And that account, they urge, is now admissible as part of the foundation of the proposed order; as being analogous to a confirmed auditor's report; and as proof of collateral facts within the meaning of this court's opinion in the case alluded to. (d) Therefore, if that account should not be deemed admissible, for that purpose, there is, even by the petitioner's own concession, no just ground for his application, and it will be unnecessary to notice any other matter in relation to it.

The confirmation of an auditor's report is, in every sense, a judgment of the court. For although it may not constitute a part of the final judgment on the whole case, it is nevertheless always considered as a judgment conclusive of the matter which it affirms,

(c) *McKim v. Thompson*, 1 Bland, 155.—(d) *McKim, v. Thompson*, 1 Bland, 155.

and to which it relates; with some exceptions, subject only to be reheard or revised for similar causes, which would induce the court to rehear or revise any other of its judgments. It has been deemed a sufficient foundation for an order to bring money into court; because it was so conclusive as to the matter in controversy to which it related, in that case and between those parties. But, even considering the settlement of this account, by this executrix *Eleanor Dawson*, before the Orphans Court, as a judgment of that tribunal; yet it certainly is not a judgment between the parties to this case, upon any point now in controversy between them. Nor can it be received as an admission in a course of judicial proceeding, in direct reference to the matters in controversy in this case, which the party can neither contradict or explain away at the final hearing. It is, therefore, in no respect, analogous to a confirmed auditor's report; and, consequently, can furnish no foundation for an order to bring money into court.

But this account, it has been urged, is admissible as proof of collateral facts, which, together with those admitted by the answer, furnish a sufficient ground for the order now asked for. I have said upon a former occasion, that the foundation for such an order must be found in the direct progress of the case; and be such as cannot be afterwards contradicted or explained away. Such is the general rule; and the reason is obvious. If the court were to stop, or to turn aside from the direct progress of the case to collect proofs, in relation to an interlocutory order respecting any matter, which must, according to the regular course, remain open for proof until the case was set down for hearing, it would thus anticipate the final hearing and decision upon the merits; and involve itself in endless difficulties and contradictions; and be employed in acting and re-acting for no beneficial purpose, or indeed, often in doing the greatest injustice to the parties.

The only cases in which the court has allowed itself to depart from this general rule, are those which arise between vendors and purchasers. The reason why affidavits are admitted, in such cases, to establish those facts and circumstances which are necessary, in connection with the pleadings, to lay a foundation for an order to bring money into court, has been already sufficiently explained in a late case. (e) This is not such a case; nor is there

(e) *McKim v. Thompson*, 1 Bland, 155.

any thing in it, which can, in any respect whatever, take it out of the general rule, which forbids the court from turning aside, from the direct progress of the case, to attend to the introduction of proofs in relation to any matter involved in a consideration of the merits of the whole case, and which should remain open until the final hearing.

It is, therefore, *Ordered*, that the order of the 27th of February last, be discharged; and the petition of the complainants be dismissed with costs.

After which commissions were taken out, under which proofs were collected and returned; and the case was brought on for a final decision.

14th April, 1829.—BLAND, *Chancellor*.—This case standing ready for hearing, the solicitors of the parties were fully heard and the proceedings read and considered.

Ann Russell, a resident of London, and a subject of the British monarch, having a large estate and many descendants, some of whom were natives and residents of England, and others residents and citizens of the United States, on the 23d of January, 1796, made her will, and some time after died; in which will is found, among others, the following bequest:

‘I give to *William Dawson*, of Wakefield, in the county of York, and to my said grandson *Robert Clerk*, their executors, administrators and assigns, the sum of £1,500, upon trust, to invest the same in their or his names or name, in the public stocks or funds, or at interest upon parliamentary, government, or real securities. And to stand possessed of the said last mentioned £1,500, or of the stocks, funds, or securities in or upon which the same shall be invested, upon trust, to pay and apply the interest and dividends thereof unto and for the sole and separate use of my granddaughter *Margaret Russell Clerk*, the wife of *James Clerk*, of Park Hall, in the province of Maryland, in North America, during her natural life. And for which interest and dividends the receipt of the said *Margaret Russell Clerk*, or of such person or persons as she shall appoint to receive the same shall, notwithstanding her present, or any future coverture, be good discharges. And from and after the decease of the said *Margaret Russell Clerk*, then upon trust to assign, transfer and pay the said last mentioned sum of £1,500, or the stocks, funds, or securities in or upon which the same shall be invested as aforesaid, unto all the children of my said grand-

daughter *Margaret Russell Clerk*, who shall be living at her death ; and who being a son, or sons, shall then have attained, or shall afterwards live to attain the age of twenty-one years ; or who being a daughter or daughters shall then have attained the age of twenty-one years, or been married, or shall afterwards live to attain that age, or be married, to be equally divided between such children, if more than one, as tenants in common. But if my said granddaughter *Margaret Russell Clerk*, shall have only one child living at her death, who being a son, shall then have attained, or shall afterwards live to attain the age of twenty-one years ; or who being a daughter, shall then have attained the age of twenty-one years, or been married ; or shall afterwards live to attain that age or be married, then upon trust to assign, transfer and pay the said last mentioned sum of £1,500, or the stocks, funds, or securities in or upon which the same shall be invested as aforesaid, unto such only child for his or her own absolute use. And in case my said granddaughter *Margaret Russell Clerk*, shall have no child or children who shall live to become entitled to the said last mentioned sum of £1,500, or the stocks, funds or securities in or upon which the same shall be invested as aforesaid, unto my grandson *John Clerk*, for his own absolute use.'

The testatrix in the same will had given a legacy to her granddaughter *Eleanor Lee*, who was a native, and then a resident of England, and a subject of the British king ; and as such incapable of taking real estate in Maryland and Virginia by descent, from several relatives from whom, but for her incapacity, in respect of her alienage, she expected and might obtain a large amount of property in common with her sisters who were citizens of the United States. In reference to this state of things, and to make some indemnity to her granddaughter *Eleanor Lee* for any loss she might thus sustain, the testatrix *Ann Russell* added the following codicil to her will :

'Understanding, that my granddaughters in America, viz. Mrs. *Sarah Contee*, Miss *Ann Lee*, and Mrs. *Magaret Russell Clerk*, intend to contest their sister *Eleanor Lee's* right to her share of her grandfather's, grandmother's, father's and mother's lands and personal estate in Maryland and Virginia, I hope and trust they are not so unnatural ; if it prove so, I will and desire, that every shilling I have left them in my said will, be paid my dear *Eleanor Lee*, added to the legacy I have left her in my will, as a compensation for what she loses by their cruelty ; but if they do not contest

it, and my dear *Eleanor Lee* receives an equal share of all the lands and personals belonging to their grandfather, grandmother, fathers and brothers, the legacy I have left in my will to remain good.' After which, on the 31st of January, 1797, the testatrix added the following words to the codicil, 'My granddaughter *Eleanor Lee* is now married to *William Dawson*, Esq. I hereby confirm the above codicil in favour of *Eleanor Lee*, now *Dawson*.'

After the death of the testatrix *Ann Russell*, her executors paid this legacy, given to *Margaret Russell Clerk* and her children, to the trustees *William Dawson* and *Robert Clerk*, by whom it was invested in the public stocks of Great Britain, in the name of *Dawson* and *Clerk*, for the purposes of the trust. After which *Robert Clerk* died, and *Dawson* became the sole surviving trustee. Some time in the year 1816, *Dawson* removed to the United States, and became a resident of Maryland. After which *Margaret Russell Clerk*, whose surname, with that of her husband and children, had been changed, by an act of the general assembly of Maryland, to *Clerklee*, (*f*) became very anxious to have the legacy given to her and her children transferred from the British funds to this country, and invested in some stock here; where, as she believed, it would be equally safe, and much more productive and convenient. Under that impression, she wrote a letter, without date, marked as the defendant's exhibit G, to *William Dawson*, which letter it may be inferred from one written by her which bears date on the 15th of September, 1817, and from another written by *William Dawson* to *James Clerklee*, on the 9th of July, 1818, was written some time about the close of the year 1817. In this letter, without date, after explaining her motives for having the legacy transferred to and invested in this country, she says, 'I therefore, with my daughters *Ann*, who is of age, *Eleanor*, *Caroline*, and *Elizabeth*, who are of an age capable of judging what is for their advantage, all having an interest in this legacy, unite, by their signatures, in this my request, as does Mr. *Clerklee*, in behalf of our two youngest children; and we therefore sincerely hope you will no longer delay complying with our request.'

What were the exact ages of *Eleanor*, *Caroline* and *Elizabeth* when they signed this letter does not appear; but it is stated in the bill, and admitted by the answer of *Elizabeth*, that she was, on the 15th of November, 1824, when the bill was filed, then a

minor; and consequently, *Elizabeth* could not then have attained the sixteenth year of her age. Hence, when *Margaret Russell Clerklee* said, that '*Eleanor, Caroline and Elizabeth* were of an age capable of judging what was for their advantage,' she could have had no reference to the legal age of sixteen, when the law gives to a female a capacity to receive her estate; (g) or indeed to any thing more than her opinion of the then natural capacity of her children. It is proved, that *Margaret Russell Clerklee*, and *James Clerklee* signed this letter; but there is no proof of the other signatures.

After the receipt of this letter, the trustee *William Dawson*, in a letter, dated on the 9th of July, 1818, and addressed to *James Clerklee*, the husband and parent of these legatees, says, 'I have much pleasure in stating to you, Mr. *J. Clerk* has consented to the legacy being transferred to this country; and further, what probably you have not much idea of, that by the advance in price in the funds, and some interest, since the death of Major *Clerk*, the amount paid to my bankers is £2,406 14s. 2d. sterling.' This surviving trustee *Dawson*, thus distinctly states, that he had sold the public stocks of Great Britain in which this legacy of £1,500 had been invested; and the sum which he had received for it.

It is stated and admitted, that *James Clerklee* and his wife *Margaret Russell Clerklee* are both dead; and it is admitted, that at the time of her death she left six children; *Ann Russell Contee*, the wife of *Philip A. L. Contee*, *Eleanor Contee*, the wife of *Edmund H. Contee*, *Caroline Ashton Hawkins*, the wife of *Josias Hawkins*, *Elizabeth Clerklee*, now of full age, and *Margaret Clerklee*, and *Sarah Emily Clerklee*, who are as yet unmarried infants. And further, that the trustee *William Dawson* is dead, and that the defendant *Eleanor Dawson* is his executrix.

The defendant *Eleanor Dawson* insists, that by an express provision of the will of the late *Ann Russell*, the matter in controversy should have been submitted to arbitration; and that no suit can be sustained by these plaintiffs at all, or at least not until they have shewn an attempt, on their part, to obtain a decision in that way. And this defendant further urges, that all the parties who have an interest in this matter, and who ought to be here, have not been brought before the court. These preliminary objections must

(g) 1715, ch. 39, s. 15; since altered by 1829, ch. 216, s. 5, and 1831, ch. 305, s. 5.

be examined and removed before we can proceed to consider the merits of the case.

That clause of the will of *Ann Russell* which, it has been urged, requires, that this matter should have been submitted to arbitration before this suit was instituted is expressed in these words :

‘And my will is, and I do hereby expressly declare and direct, that if at any time or times, after my death, any dispute, doubt or question whatever shall arise touching this my will, or the construction, or true meaning thereof, or of any part or parts thereof; then and in such case, and from time to time so often as any such dispute, doubt or question shall arise, the same shall be referred to and settled and determined by the said *Hugh Inglis*, and *Edmund Antrobus*, or the survivor of them, or the executors, or administrators of such survivor, whose award, settlement and determination in the premises or respecting the matter or matters in dispute, shall be binding and conclusive to and upon all parties concerned therein, or in any wise interested under this my will. And I do hereby further direct and declare, that if the person or persons concerned in any such dispute, doubt, or question as aforesaid, or any of them shall neglect or refuse to submit to or abide by and comply with the award, settlement, or determination to be made thereon, or respecting the same by the said *Hugh Inglis* and *Edmund Antrobus*, or the survivor of them, or his executors or administrators as aforesaid; or if any person or persons entitled, or who shall or may become entitled to any legacy or legacies, sum or sums of money, or other benefit, interest or advantage whatsoever under, or by virtue of this my will, or any of the devises, bequests or trusts herein before contained shall, at any time or times, after my death, dispute or contest the validity of, or in any wise attempt, or endeavour to avoid, defeat, set aside or litigate this my will, or any part or parts thereof; or shall bring, commence, or institute any action or other proceeding against the said *Hugh Inglis* and *Edmund Antrobus*, or either of them, their, or either of their executors or administrators, in any court or courts of law or equity, or in any ecclesiastical or other court or courts whatsoever, either touching or concerning the executorship of this my will, or touching or concerning any other act, transaction, matter, or thing in any wise relating to my estates or affairs, or the conduct, management, application or accounts thereof. Then and in any of the cases above mentioned; and from and immediately after any of them shall happen the person or persons so refusing

or neglecting to submit to, or abide by and comply with such award, settlement or determination, to be made by the said *Hugh Inglis* and *Edmund Antrobus*, or the survivor or them, or the executors and administrators of such survivor as aforesaid; and the person or persons so disputing or contesting the validity, or attempting or endeavoring to avoid, defeat or set aside, or litigate this my will, or part or parts thereof, or so bringing, commencing, or instituting any action, suit, or other proceedings against the said *Hugh Inglis* and *Edmund Antrobus*, or either of them, their, or either of their executors or administrators as aforesaid, shall cease to have, take, derive, or be entitled to; and shall be from thenceforth absolutely barred, prevented, and excluded from having, taking, deriving, or being entitled to any legacy, sum of money, or other benefit, interest or advantage whatever under or by virtue of this my will, or any of the devises, bequests or trusts herein contained. And when any of the cases above mentioned shall happen, and from time to time so often as any of them shall happen, I give and bequeath the legacy or legacies, sum or sums of money, and all other the benefits, interests and advantages which the person or persons acting contrary to the directions or declarations last herein before contained would otherwise have been entitled under this my will, or the devises, bequests, or trusts aforesaid, unto the said *Hugh Inglis* and *Edmund Antrobus*' executors, administrators and assigns for their own absolute use and benefit.'

The position taken upon this provision of this will is one which has been repeatedly considered as well with regard to contracts as to last wills. It is not unfrequent in contracts, particularly in articles of co-partnership, to insert a covenant, that in case of any dispute arising between the parties, they shall forbear to sue, and refer the matter to arbitration. There can be no doubt, that if in pursuance of such a stipulation, any matter of controversy is submitted to arbitrators, and an award is made, it will be binding and a complete bar to any suit which either party may bring for the same cause of action. (h) But the award must be in all respects fair and unimpeachable; and for the purpose of ascertaining whether it is so or not, it may be reviewed and examined as in all other similar cases in a court of equity. (i) It is however an established rule, as well at law as in equity, that no mere agreement to refer any con-

(h) *Kill v. Hollister*, 1 Wils. 129; *Thompson v. Charnock*, 8 T. R. 139.—
 (i) *Mitchell v. Harris*, 2 Ves. jun. 135; *Nichols v. Chalie*, 14 Ves. 265.

troversy to arbitration will oust the proper courts of justice of their jurisdiction in the case. (*j*)

A covenant never to sue for an existing demand, like a release of all suits, to avoid circuity of action, is construed to be an entire release of the demand itself; since the being divested of all power to enforce a right in a court of justice, where alone rights can be enforced, is, in effect, the being stripped of all right whatever. (*k*) An agreement to forbear to sue, under a certain penalty, until an arbitration has been had may give the party injured a right to recover the penalty. But as a court of equity cannot decree a specific performance of a contract for the reference of a dispute to arbitration, the parties must be allowed to bring their case before the proper tribunals of the country; and this will appear to be the more necessary when the imbecile and improvident nature of the domestic forum is considered. (*l*)

Arbitrators, according to the English law, have no power to enforce the attendance of witnesses, or to administer an oath to those who do attend; they can only decide upon the admissions of the parties, or on such testimony as may be voluntarily offered to them. (*m*) But under our act of assembly, (*n*) 'and the approved custom of the court,' as it is called, the courts of law in their rule, referring a case then depending, have given power to the referees to examine evidences on oath by the consent of both parties. (*o*) And here, as in England, this court has always been in the habit of entering decrees upon and enforcing awards by virtue of its own orders in cases then depending. (*p*) There are, however, cases in which a

(*j*) *Tattersall v. Groot*, 2 Bos. & Pul. 132; *Allegre v. Insurance Company*, 6 H. & J. 413; *Platt on Covenants*, 146.—(*k*) *Co. Litt.* 165.—(*l*) *Street v. Rigby*, 6 Ves. 818.—(*m*) *Street v. Rigby*, 6 Ves. 821.—(*n*) 1778, ch. 21, s. 8.—(*o*) 2 Harr. Entries. 156, 229.—(*p*) *Ormond v. Kynnersley*, 1 Cond. Chan. Rep. 325; *Haggett v. Walsh*, 2 Cond. Chan. Rep. 68; *Phillips v. Shipley*, 1 Bland, 516.

GARDNER v. DICK.—This bill was filed on the 25th day of October, 1750, by Jeremiah Gardner and Daniel Legg, assignees of Daniel Dodson, who was assignee of John Peele, a bankrupt, now deceased, against James Dick, James Mowat, and James Nicholson, executors of William Peale, deceased, and William Cummings and Richard Snowden. The bill alleges, that Samuel Peele and William Peele were largely indebted to John Peele, and being so indebted, William Peele conveyed the greater part of his personal estate, consisting chiefly of negroes, to the defendants, Cummings and Snowden, with intent to defraud his creditors. Whereupon it was prayed, that the defendants, executors of William Peele, might be made to account for the assets which had come to their hands; that the conveyance to Cummings and Snowden might be set aside; that they also might be compelled to account, and that the assets might be applied to the satisfaction of the debt due to the plaintiffs.

Court of Chancery, from the difficulty it finds in dealing with the subject in dispute without great loss or total ruin, has earnestly recommended and insisted upon the parties, submitting the matter in controversy to arbitration, according to the terms of their previous express agreement. (q)

As in contracts, an absolute unqualified covenant not to sue for the recovery of an existing demand, amounts to a release of the

The executors put in a joint and separate answer, in which they made some statements as to the assets which had come to their hands; denied having any concern with the conveyance to their co-defendants, and declared that they were ready to account, &c. This answer was sworn to by each of these defendants, before one of the justices of the provincial court.

The defendants Cummings and Snowden, put in their joint and separate answer, in which they averred, that the conveyance to them had been made *bona fide*, for the purpose of indemnifying them against their liability as sureties in an administration bond given by the said William Peele, and that on being indemnified, they were willing to deliver up the property which had been so conveyed to them, &c. This answer was sworn to by the defendant Cummings, on the 16th of February, 1750. And it was affirmed to by Richard Snowden, the other defendant, being one of the people called Quakers, on the 25th of February, 1750,' before the same justice of the peace.

May, 1752, SHARPE, Chancellor.—*Ordered*, that this cause be entered abated, as far as it relates to William Cummings, one of the defendants mentioned in the bill of complaint.

The case having been continued from time to time, was again brought before the court.

February, 1753.—SHARPE, Chancellor.—*Ordered*, in presence of the counsel on both sides, that this cause be referred to Henry Hall, Bryan Philpot, Charles Graham and Robert Swan, or any three of them, and that their award be a decree of this court.

After which, on the 26th of September, 1753, the referrees made a report as follows: 'We, the subscribers, by virtue of an order of the Court of Chancery to arbitrate and determine a suit depending in said court between Jeremiah Gardner, &c. complainants, and James Dick, &c. respondents, do award, order and adjudge, that the said James Dick, James Mowatt, James Nicholson, and Richard Snowden, do pay, or cause to be paid to the said Gardener and Legg, or to Samuel Galloway their attorney in fact, for their use, the sum of £256 6s. 2d. sterling, out of the effects of William Peele aforesaid, in the hands of his executors James Dick, James Mowatt, and James Nicholson, being the full balance of accounts due from Samuel Peele and William Peele, deceased, to John Peele, together with the legal costs arising in said suit.' Whereupon it was prayed, that the said report might stand confirmed.

30th October, 1753.—SHARPE, Chancellor.—*Decreed*, that the said report and all the matters and things therein contained, do stand ratified and confirmed, by the order, authority, and decree of this court, to be observed and performed by all parties according to the tenor and true meaning thereof.—*Chancery Proceedings, lib. J. R. No. 5, fol. 1057, 1075.*

(q) Waters v. Taylor, 15 Ves. 10.

demand itself; so in a will, a positive and unlimited prohibition to sue, would, if enforced, in most cases, operate as a total revocation, or abnegation of the devise itself; and it would be a contradiction in terms and idle, to make a donation, and in the same breath to withhold from the donee all legal means of sustaining his right to the subject bestowed upon him. Hence, where a testator, by his last will, declares, that any legatee who controverts the disposition he has made of his estate shall, by so doing, forfeit his legacy; such provision is held to be *in terrorim* only; and that no such forfeiture can be incurred by contesting any disputable matter, in relation to it, in a court of justice. (*r*)

By the law of Virginia, real estate may be devised by a holographic will, without any attestation whatever. (*s*) Under which law, our late great leader *George Washington*, wrote his will altogether in his own hand writing, without having it attested by any witnesses, by which he devised lands lying in the states of Virginia, Maryland, Pennsylvania, New York, and Kentucky, and in the territory north-west of the Ohio; and concluded by directing, that should any dispute arise, the matter should be decided by arbitrators to be chosen by the disputants; but without declaring, that the party who refused to submit to an arbitration should forfeit his right, or that the devised estate should go over to another. (*t*) This holographic will, although valid in Virginia, it is clear, was a nullity as to the real estate in Maryland, because of its not having been attested by three witnesses. Disputes did arise as to this or some other defect or ambiguity of this will; and yet it is understood to have been the opinion of the profession, that this provision directing a reference to arbitrators, did not prevent any party from instituting a suit to establish and recover his right. But the differences among the devisees and legatees were amicably adjusted without bringing suit.

It is said, that where the bringing of a suit by the legatee is prohibited with a bequest over, as in this instance, that then the consequence of bringing suit will be a forfeiture of the legacy. Where a testator devised his estate to trustees to be sold or disposed of for the payment of his debts, and to make provision for his

(*r*) *Gibbons v. Dawley*, 2 Ca. Chan. 193; *Powell v. Morgan*, 2 Vern. 90; *Loyd v. Spillet*, 3 P. Will. 346; *Morris v. Burroughs*, 1 Atk. 404.—(*s*) *Laws Virginia*, 1748, ch. 5, s. 6; 1792, ch. 1; *Domat Civil Law*, pt. 2, b. 3, tit. 1, s. 1; *Code Nap.* s. 970; *De Sobry v. De Laistre*, 2 H. & J. 193.—(*t*) *Ramsay's Life Washington*, Appendix.

younger children ; and then gave a legacy of £40 to his heir, upon condition, that he did not disturb the trustees. Upon a bill filed, by the trustees, to have an execution of the trust, it was held, that the heir must either join in the sale, or lose his legacy. (*u*) This case has been sometimes cited to shew, that where there is a bequest over the legacy will be forfeited, if the legatee institutes a suit ; but it evidently has no direct bearing upon that question. It merely shews, that where a legacy is given to one upon condition, that he aids in, or does not counteract the execution of the testator's will, the legacy cannot be recovered unless the condition be complied with. It establishes the position, that where a bequest is made for a valuable consideration, if the consideration be withheld, the legacy falls. The case has this extent and no more.

There may, however, be some cases which do, apparently, support the position as a general rule. But the decision, in a leading case, usually cited for this purpose, rests upon other and better principles than those by which the rule as to a devise over, is said to be sustained. The case was this : A freeman of London had several children, all of whom he advanced in marriage in his lifetime ; after which, by his will, he gave to one of his daughters £35, taking notice, that he had advanced her ; provided, that if she, or her husband, should refuse to give a release to his executors, or should any ways trouble or disturb them, upon any claim or pretence by virtue of the custom of London, that the legacy of £35 given to her, should go over to the child of his youngest deceased daughter. After the testator's death, this legatee brought suit to recover her portion according to the custom of London ; and it was proved, that she had been advanced, as noticed in her father's will. Upon which it was held, that she was barred of her customary part, as having been fully advanced ; and likewise, that she and her husband had forfeited the £35 legacy by her claiming her orphanage part, and by reason of the devise over. (*w*)

It is evident, from this condensed view of the case, that the attempt to recover a child's portion, which had been actually advanced and paid, was a corrupt effort to obtain what was not due, to the prejudice of the other children ; and was such an iniquitous movement as required to be repelled, and deserved to be punished. Therefore, the forfeiture was justly imposed as an award due to detected fraud ; and because of the legatee's claiming the orphan-

(*u*) *Webb v. Webb*, 1 P. Will. 132.—(*w*) *Cleaver v. Spurling*, 2 P. Will. 526.

age part, and by reason of the devise over. By which the testator manifested his intention to impose a penalty upon such a fraudulent attempt; and not because of the other and the quaint conceit assigned as a reason, that when the legacy was once vested in the devisee over, equity could not fetch it back again. For the mixture of good and ill together makes the whole bad; the truth is obscured by the falsehood; the virtue drowned by the vice. And there are many instances both at law and in equity, where the whole of a just claim may be lost, because of a fraud against others, or the playing of a trick to come at it. (x)

Considering this decision as resting upon this ground, that the testator and the court imposed and enforced the forfeiture to prevent and punish a fraudulent attempt to obtain a double or unjust proportion of an estate, it will be found to accord in principle with a legal provision which has received, for a length of time, the reiterated approbation of the general assembly of this state; besides having had, in other countries, for ages past, the sanction of a very large and enlightened portion of mankind. By a provision of one of the annual insolvent laws, (y) which has been often re-enacted, and is now the standing law of the state, it is declared, that if a creditor, to whom a real debt is due, shall collude with the debtor to gain an undue preference, or for concealment of any part of the debtor's estate, or shall concert any acknowledgment of the debtor, or any kind of security, to give false colour to his claim for more than is *bona fide* due, such creditor, shall lose his debt truly due; (z) evidently, as a punishment for his fraudulent and corrupt attempt to prejudice or cheat others. A similar legal provision forms a part of the code of England, Scotland, France, Spain, and Hindostan. (a)

Taking this view of the subject, it is clear, that a mere devise over will not, in all cases, cause the forfeiture to be enforced on a suit's being brought; but, it must clearly appear, from the nature of the case, that the institution of the suit can only be considered as the commencement or partial execution of a corrupt and fraudulent design to injure others, or those to whom, in such an event, the legacy is given over. For it would be a strange inconsistency

(x) Co. Litt. 35, a.; Hitchcock v. Sedgwick, 2 Vern. 162; Dalbiac v. Dalbiac, 16 Ves. 125; Wimbish v. Tailbois, 1 Plow. 54.—(y) 1791, ch. 73, s. 11.—(z) 1805, ch. 110, s. 12.—(a) Cooper's Bank'r Law, Adden. 12, 13; Kames' Prin. Eq. b. 3, c. 5, page 455, note 457.

to impute to any testator, that he intended to expose the object of his bounty to be disappointed by accident or caprice; or that he should seriously have intended to prohibit him from asking the aid of a court of justice to obtain that which he had actually given him.

In this case I find it impossible to believe, that *Ann Russell* really intended to declare, that any one of her descendants, about whom she has manifested so much impartial solicitude, should forfeit her legacy by claiming it in any form of suit; and that it should, in such case, vest in persons toward whom she entertained no such specially kind and maternal feelings; and who too, by being nominated as the executors, arbitrators, and legatees over, were so deeply interested, and had it so much in their power to provoke a suit so as to produce a forfeiture. I therefore hold, that this clause of this will, requiring all disputes to be submitted to arbitration, is to be regarded in no other light than as a strong admonition or threat intended to preserve harmony among the various objects of her bounty.

But, apart from these considerations, this clause can have no direct bearing upon the present controversy. This is not a suit against the executors of the late *Ann Russell*, or one in which the validity and operation of the will is questioned in any way whatever; on the contrary, it is founded upon an admission of the will in all respects, and claims the fulfilment of its provisions of the trustee to whom, and to a suit of this nature, requiring disputed matters to be referred to the nominated arbitrators, cannot have been intended to apply; because the testatrix has distinctly contemplated the responsibility of the trustees *Dawson* and *Clerk*, according to a regular judicial proceeding, by her express declaration, that they should only be answerable for gross negligence; and it is the alleged negligence and mismanagement of the surviving trustee which is the cause of this suit, not any dispute about the will.

I therefore conceive, that there is no foundation for this first objection, and that this suit may well be sustained notwithstanding this clause requiring certain matters therein specified to be referred to arbitration in case of any dispute.

The next preliminary objection is as to the want of parties. It is urged, that *Ann Russell Contee*, the wife of the defendant *Philip A. L. Contee*, had a direct interest in this matter; and that her legal representatives, the bill stating her to be dead, ought to have been made parties. If the interest of *Ann R. Contee* in this

legacy became vested as it did by her attaining her full age, or by her marriage before or after the death of her mother, it was a *chose in action* belonging to *Ann R. Contee*; and as all personal things are under the power of the husband, he may either release or forfeit them; (b) it is, therefore, upon that ground sufficient, that the husband alone as defendant has appeared, and by his answer admitted, that this claim, to which he had so become entitled in right of his wife, had been satisfied.

But it is objected, on behalf of the defendant *Eleanor Dawson*, that the answer of the defendant *Philip A. L. Contee* has not been sworn to in the manner required by the course of the court; and therefore cannot be considered as an answer for any purpose; and is certainly not such an answer as will bind him and his wife so as to justify *Eleanor Dawson*, as executrix of the trustee, in distributing the assets in payment of the proportions to which the other legatees are entitled; since she has not assets sufficient to satisfy all. This objection involves two inquiries; *first*, whether the answer of the defendant *Philip A. L. Contee* is such an one as must be received as effectual so far as it can operate for or against his co-defendants; and *secondly*, whether *Eleanor Dawson* has in truth alleged and shewn a deficiency of assets.

The first section of the fourth article of the constitution of the United States delegates to congress the power to prescribe the manner in which the public acts, the records, and the judicial proceedings of each state may be proved in every other state, and the effect thereof. And congress have passed several acts in execution of this power. But those laws of the federal government cannot be allowed to regulate the matter now under consideration; because, an answer to a bill filed in this court, or indeed any other portion of its proceedings, wherever it may be authenticated, or wherever the person may reside from whom it may be derived, must be deemed to all intents and purposes a record or judicial proceeding of this state only, and not of any other state. It is, therefore, perfectly obvious, that this federal law can have no direct and positive application to the mode of authenticating answers, or any other part of the judicial proceedings of this court. (c)

It is quite common for the courts of one nation to seek the aid of the magistrates of foreign countries; and to ask to be allowed to collect testimony, and obtain from them and under their autho-

(b) *Cleaver v. Spurling*, 2 P. Will. 528.—(c) *Gibson v. Tilton*, 1 Bland, 352.

city the means of administering justice at home. The acts, testimonials, and documents thus drawn from abroad, are accepted as a courtesy from the foreign nation, and accredited, not upon the ground of their having any force or operation in the country from which they are derived, (*d*) but because of the value set upon them by the tribunal before which they are used. They are nothing where taken; but duly and properly appreciated here where they are allowed to be, to a certain extent, available. (*e*)

Considering the great intercourse between the several states of our Union, it is obvious, that in many cases it would be difficult to do justice unless the courts of the several states should lend their aid to each other in matters, from any jurisdiction over which, all other judicial power was excluded. (*f*) It seems that some of the English courts have held, that no difference in point of reason or law, exists between affidavits made in Ireland and Scotland, and those made abroad; (*g*) but others of the English tribunals have entertained a higher respect for such acts coming from the sister kingdoms of Scotland and Ireland, than from foreign nations. (*h*)

In accordance with the principles of these last mentioned English authorities, I feel disposed to go forward with the spirit of the federal constitution, and to allow all such ancillary testimonials, derived from any sister state or territory of our Union, to be used in a course of judicial proceeding without strictly exacting all those solemnities and forms of authentication usually required for the admission of similar testimony from an entirely foreign nation. It is not saying too much to aver, that all the public functionaries, of

(*d*) *Kennedy v. Earl of Cassillis*, 2 Swan. 322.—(*e*) *Parsons v. Dunne*, 2 Ves. 60; *Gason v. Wordsworth*, 2 Ves. 325, 336; *Minet v. Hyde*, 2 Bro. Ch. C. 663; *Bourdillon v. Adair*, 3 Bro. C. C. 237; *Hornby v. Pemberton*, Mosely, 58; *Campbell v. French*, 3 Ves. 321; *Garvey v. Hibbert*, 1 Jac. and Walk. 180; *Thurlt v. Faber*, 18 Com. Law Rep. 136; *Turnbull v. Moreton*, 18 Com. Law Rep. 215.

(*f*) *Kennedy v. Earl of Cassillis*, 2 Swan. 313.

TAYLOR v. TAYLOR.—‘This 5th day of March, 1713, a commission came from Doctors Commons to the honourable the president and council, or any of them, to examine witnesses in a cause depending at said Commons, betwixt John Taylor, of the city of London, merchant, and Mary Taylor, in said Commons, fourteen days’ notice to be given to Robert Bradley, substituted the proctor of the said Mary. His honor Edward Lloyd, Esq. (then Chancellor) *Orders*, that summons issue for such evidences as Charles Carroll, Esq. substituted for the proctor of the said John Taylor, shall require.’—*Chancery Proceedings*, lib. P. L. fol. 63.

(*g*) *Omealy v. Newell*, 8 East, 372.—(*h*) *Annesley v. Anglesey*, Dick, 90; *Chicot v. Lequesne*, Dick. 150; *Johnson v. Smith*, Dick, 592; 2 Fowl. Exch. Pra. 337; *Braham v. Bowes*, 1 Jac. and Walk. 296; *Ex parte Worsley*, 2 H. Blac. 275; *Dalmer v. Barnard*, 7 T. R. 251.

each state of our perpetually intermingling confederacy, know more of the forms and modes of proceeding of the officers and magistrates of every other state than of any foreign nation whatever. And besides, the harmonies of our peculiar system of government seem to require, that the magistrates and tribunals of each state should extend the practice of comity and credit toward those of every other state, as far as safety to the rights of persons and property will permit, and that may be to a considerable extent; for although, in such cases, there can be no prosecution for perjury against any one here, who has, abroad, testified on oath, or made affidavit to the truth of a fact, which can be shewn to be false, yet the parties may be punished for practising an imposition upon the court. (i)

This court has, in fact, acted upon the distinction between testimonials from other states of our Union and those from foreign nations for many years past. Prior to the revolution, certainly as late as the year 1761, it was the practice here, in accordance with the English mode of proceeding, to send a *didimus potestatem*, even to a neighbouring colony, to take the answer of a defendant resident there. (j) But soon after the revolution a *didimus potestatem*, seems to have been dispensed with, and answers from other states of our confederacy by being sworn to before a mayor or other principal magistrate of a city, or a justice of the peace, on its being certified under the seal of the proper officer, that the person who administered the oath or affirmation was then in truth the officer he professed to be; (k) as where an answer had been sworn to before a justice of the peace of the District of Columbia; and it was certified, in the usual form, by the clerk of the county, that he was duly commissioned at that time, the answer was received. (l)

But in the case under consideration, the affidavit of the truth of the answer of the defendant *Philip A. L. Contee*, purports to have been made before a justice of the peace of Westmoreland county,

(i) *Omealy v. Newell*, 8 East. 372.—(j) *Chancery Proceedings*, lib. D. D. No. J. fol. 59.

PROUT v. SLATER.—On 3d of April, 1799, on the petition of the defendants here to take the answer of one of them who resided in London, a commission was issued to four commissioners or either of them, that they or either of them administer the oath. The answer so taken was certified by the commissioners, and then certified by a notary public.—*Chancery Proceedings*, lib. S. H. H. No. 7, fol. 25.

(k) *Hartshorne v. Hands*, 2d June, 1795. M. S.—(l) *Murdock v. Forrest*, 1803, and 1815, M. S.; *Gibson v. Tilton*, 1 Bland, 352.

in the state of Virginia, without any further authentication whatever. This, if allowed, would place the simple attestation of every justice of the peace, over the whole Union, upon a footing with that of such officers of this state. I do not think it would be safe to extend our comity so far. A reasonable and just degree of caution demands, that some solemn additional public testimonial should be required to shew, that the judicial officer or magistrate before whom such an affidavit has been made was, in truth, the public functionary he states himself to be. I am, therefore, of opinion, that the authentication of this paper is not such as to entitle it, on that ground, to be received as the answer of the defendant *Philip A. L. Contee*.

But the plaintiffs have expressly consented to receive this as the answer on oath of *Philip A. L. Contee*, without any further or other authentication; and that they may so receive it, is warranted by every day's practice of this court, as well as by many authorities to be found in the English books to the same effect. (*m*) If, on its being so received by the plaintiff, it will bind the respondent as effectually as if made upon oath, I can see no reason why it should not be equally as binding upon any co-defendant so far as his interest may be affected by the answer of such defendant on oath; since such co-defendant could not except to it because of its not having been sworn to, or because of its insufficiency, or for any other cause. I am, therefore, of opinion, no fraud being shewn or even intimated, that this must be regarded as the answer of *Philip A. L. Contee*, to all intents and purposes whatever.

The next inquiry is, whether *Eleanor Dawson* has alleged, or shewn a deficiency of assets. In her answer she says, 'that she has not yet been able to settle up the estate of the said testator, and that there are considerable debts now due to the same which are still unpaid; and the assets now in her possession are insufficient to discharge the debts due by the testator.'

It is a rule, universally admitted, that the *allegata* and *probata*, must substantially correspond. A party cannot, in any case, be allowed to avail himself of proof of any matter, which he has not alleged; nor can the opposite party be called on to sustain a position not asserted; or to establish a fact which, by the course and terms of the pleadings, has been admitted to be true. An allega-

(*m*) ——— *v. Lake*, 6 Ves. 171; ——— *v. Gwillim*, 6 Ves. 285; *Bayley v. De Walkiers*, 10 Ves. 441; *Harding v. Harding*, 12 Ves. 159; 1 Harri. Prac. Chan. 285.

tion of insufficiency of assets is tantamount to an assertion, that the estate of the deceased is insolvent. It is a matter presumed to be within the knowledge of the executor; and if he does not expressly and distinctly assert the fact of insufficiency, he virtually admits a sufficiency of assets, at least to satisfy the demand then made of him. It is impossible to consider the allegation in this answer as an assertion, that the estate of the late *William Dawson* is insolvent and insufficient to pay all his debts. The allegation, 'that the assets now in her possession are insufficient,' is unequivocal; the certainty of assets accruing, is distinctly referred to; and it is evident, from the general complexion of the answer, that the respondent could not with a safe conscience hazard the assertion, that the estate of her testator was insolvent. She has not, therefore, alleged, that there was not a sufficiency of assets to satisfy the claims made by this suit. (n)

But admitting such an averment to have been made, it has not been sustained by proof. The insufficiency of assets turns altogether upon the admission of the claim of *James Dawson*, as a valid and subsisting debt. The proof is, that the witness some time prior to the year 1816, when *William Dawson* came to this country, saw that he had charged himself on his books of accounts, with a bond given to *James Dawson*, his son, to secure the payment of the sum of \$16,000, after his, *William Dawson's* death; and that the witness heard, in the family, and from his mother, the defendant *Eleanor Dawson*, before the institution of this suit, that *James Dawson* had such a claim against the now late *William Dawson*, and that a small part of it had been paid; and, yet it was not until after *Eleanor Dawson*, as he says, had been informed of the claim in this case, and another claim against the estate of her testator, that she was induced to obtain leave to reform her account with the Orphans Court, for the purpose of introducing into it, then for the first time, this claim of *James Dawson*. But failing in the attempt to have this claim allowed by that court; and after she had heard that *James Dawson* had left England for India, she herself caused a suit to be instituted in his name against herself; and, on the 2d of June, 1826, confessed a judgment for the sum of \$19,834 35, with interest from the 31st of December, 1818, and

(n) *Dagly v. Crump*, Dick. 35; *Roberts v. Roberts*, Dick. 573; *Pullen v. Smith*, 5 Ves. 21; *Freeman v. Fairlie*, 3 Meriv. 29; *Drewry v. Thacker*, 3 Swan, 548; *Johnson v. Aston*, 1 Cond. Chan. Rep. 38.

costs to be levied on the assets in hand, or as they should accrue in a due course of administration.

Taking all the proof together then, including this solemn formulary of a judgment, and the authenticity of this alleged claim of *James Dawson*, rests upon mere hearsay, and a great portion of that hearsay derived from the defendant *Eleanor Dawson* herself. There is no direct competent proof, that *James Dawson* ever, by himself, or his attorney, or agent, asserted, that he had such a claim against the estate of his father. And it is even left somewhat doubtful, from what is said of his being in a remote region of the earth, whether he was actually alive when this judgment was got up on his behalf. The question whether any debt was due, and to what extent, has never been tried with that searching attention which these plaintiffs had a right to expect from this executrix. (o) It is true, that an executor is allowed to pay any creditor of his testator; and is not bound to contest the claim; but, under colour of satisfying a creditor, he cannot be permitted to retain without control, or to give away the assets of his testator. (p)

In short, looking to all the circumstances, in relation to this debt, said to be due to *James Dawson*, I cannot consider it to be such a claim as ought to be allowed to diminish or exhaust the assets of the testator *William Dawson*, to the prejudice of these legatees, who also stand here upon the strong ground of being his creditors. Laying aside this claim of *James Dawson*, there is certainly no allegation or proof of any deficiency of assets; and consequently the argument, that all these legatees, children of *Margaret Russell Clerklee*, must be parties to this suit to receive now their respective proportions of the assets; because of there not being enough to pay all, must entirely fail, and there is an end to all objections on that ground.

Advancing now to the consideration of the merits of this controversy, after having cleared away the preliminary objections, the first inquiry which presents itself is as to the nature of the interest which has been given in this legacy to the children of the late *Margaret Russell Clerklee*.

It is very clear, that no other interest vested in the mother, than the right to receive the annual fruits or dividends during her life; and after her death, which has happened, the whole principal and interest or dividends passed to her children. She left six daugh-

ters and no son. Three of her daughters have been married; one has since attained the age of twenty-one years; and two are yet unmarried infants. By the terms of the will of *Ann Russell*, a right to a share of this legacy could only vest in any of these daughters on the occurrence of one of four circumstances in addition to that of her having survived her mother; *first*, she must then have attained the age of twenty-one years; or *secondly*, she must have been then married; or *thirdly*, she must after the death of her mother have been married; or *fourthly*, after that event she must have lived to attain the age of twenty-one years. Upon the happening of any of these circumstances an interest in a due proportion of this legacy vested in each daughter so qualified, as a tenant in common, with her other sisters, who should, in like manner, then be or thereafter become entitled to a share.

The legacy is directed to be equally divided among all, if all should become so qualified to take. Hence, on the death of the mother, leaving six daughters, it became liable, upon the happening of the specified contingencies, to be divided into six equal parts; each one of which could only vest as each daughter, who then was, or thereafter became qualified to take. But as, upon the death of any one of the six daughters before she becomes entitled to take, her share would fall in for the benefit of the rest; or in other words, the whole legacy would not, in such case, be divided into so many as six parts; the number of shares into which it must ultimately be divided cannot be finally determined until it shall have been ascertained, whether or not any have died without having been qualified to take, after the youngest of them shall have been married, or shall have attained the age of twenty-one years. Before the institution of this suit, on or after the death of the mother, three parts of this legacy became vested in those of her daughters who were then or thereafter of full age or married; and one other part, after the filing of this bill, became vested in the defendant *Elizabeth Clerklee*, who attained her full age. And, consequently, the two remaining parts must await the event of the marriage, or coming of age of the two now unmarried infant daughters; until the happening of one or the other of which contingencies, or the death of either or both of those infants previous thereto, they first, and next their sisters, have an expectant interest in those two parts of this legacy, to meet the happening of which event the amount of those shares must be still retained in trust.

But it has been contended, that this legacy has been transferred

to this country, and lost without the default of the trustee; and therefore, that these plaintiffs cannot recover any thing, or certainly no more than a proportion of what has been saved, and is now in the hands of his executrix the defendant *Eleanor Dawson*; since it has been expressly declared by the testatrix *Ann Russell*, that 'they, the trustees, shall not be answerable or accountable for any misfortune, loss, or damage whatever, that may happen to the said trust moneys, or premises, or any part or parts thereof, unless the same shall happen by or through their or his gross and wilful neglect or default respectively.'

It is distinctly shewn by the codicil to this will, and so admitted, that the testatrix *Ann Russell* made her will with a full knowledge of the situation and legal capacities of all her legatees. She designates these legatees as the children of her granddaughter *Margaret R. Clerk*, wife of *James Clerk*, of Maryland; and with this full knowledge of all circumstances, the testatrix gave this legacy, and directed the trustee 'to invest the same in their or his names or name in the public stocks or funds, or at interest upon parliamentary, government, or real securities.'

This specific direction as to the disposition to be made of this legacy, it is evident, was given with a view, that it might be, without delay, made productive, and placed in the greatest possible security, to await the remote events which it was declared should happen before it should be wholly paid over. The trustees were allowed a very limited range of discretion as to the species of investment in England, and no where else. And it manifestly appears to have been the intention of the testatrix, that when the investment had once been made it should remain, without exposing the legacy to any new risk by any change whatever; or if any unforeseen circumstance should render a new investment necessary, that it should be made in some one or other of the specified English securities; and certainly not in any foreign funds, stocks, or securities whatever. (q)

Hence, I feel perfectly satisfied, that the sale made by the surviving trustee *William Dawson*, of the stocks in which this legacy had been invested, and the transfer of the proceeds from England to Maryland was a most palpable and gross violation of the trust reposed in him; and that he must be held strictly accountable for

(q) *Hancom v. Allen*, 2 Dick. 498; *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Hill v. Simpson*, 7 Ves. 152; *Holland v. Hughes*, 16 Ves. 113; *Ram. on Assets*, 517.

all the consequences thereof; unless he, or at this time, his executrix, can shew that he was induced to make the sale and transfer by the *cestui que trusts*, who were then competent to recommend and to sanction the transaction.

The interest of the *cestui que trust*, Margaret R. Clerklee, extended only to the profits and dividends of the invested legacy during her life, to dispose of as a *feme sole*; and therefore, as it has been proved, that she advised and required the change to be made, she might have been bound to submit to any loss sustained by reason of the transfer. But the consent of her children to the sale, which has been so much relied on, was given, if at all, during her life-time; and consequently, before any interest whatever had vested in them. The direction of the legacy toward them was, at that time, a mere possibility; they might, none of them, have survived their mother; and if they had, still they might, all of them, have died before they became entitled to take; in which case the legacy went over to John Clerk. The children of Margaret R. Clerklee during her life, were then the mere apparent, but by no means the actual *cestui que trusts* of this legacy. And having nothing more than a possibility or expectancy, without even the shadow of an absolutely vested interest, they had nothing to release, nor any estate which they could require or authorize the trustee to dispose of or transfer. And therefore, even supposing the proofs had established the fact, that they had each one, being competent to contract, required the transfer to be made; yet as it was made before any right whatever had accrued to them, it could not be deemed a sound and available sanction of the conduct of this trustee. For the relinquishment of a mere expectancy, as the release of an heir apparent during the life of the ancestor is absolutely void. (r)

If, however, these daughters had been sole and nearly of full age, and had by misrepresentation, concealment, or any fraudulent means induced the trustee to make this transfer; and the trustee had made it under a confident and honest, but erroneous reliance on their assurances, he certainly could not now be made to bear any loss which ensued in consequence thereof. (s) But the defendant Philip A. L. Contee admits, that the claim to a share of this legacy which had devolved upon him, in right of his wife, has been satisfied; and there is no proof whatever, that any of the

(r) Co. Litt. 265; Thomas v. Freeman, 2 Vern. 563; Jones v. Roe, 3 T. R. 93.—

(s) Cory v. Gertcken, 2 Mad. Rep. 40.

other children of the late *Margaret R. Clerklee* ever, in any form, requested or approved of the transfer made by the trustee *William Dawson*; or that they were then of an age to mislead him in the execution of his trust, or to practise a fraud upon him in any way whatever. I am therefore of opinion, that the sale of the English stocks, in which this legacy had been vested, as regards all these daughters, except *Ann Russell Contee*, never was required to be made, and has not been sanctioned, in any manner whatever, by these *cestui que trusts*; and that the trustee must be held liable for all the consequences of that unwarrantable act.

Hence, supposing it to have been proved, that the proceeds of the English stocks in which this legacy had been invested, had been brought to Maryland, and, in great part, invested in the stock of the City Bank of Baltimore, and lost by the insolvency of that institution; and other parts loaned on a mortgage of real estate, as is alleged, still the trustee *Dawson*, and his executrix the defendant *Eleanor Dawson*, must be held liable. But there is, in fact, no satisfactory proof, that any part of the proceeds of the sale of the English stocks were actually invested in the stock of the City Bank of Baltimore.

The defendant *Eleanor Dawson* has attempted to take shelter under another defence. *Ann Russell*, by the codicil to her will, has declared, in effect, as it is said, that if *Margaret R. Clerklee* contests *Eleanor Dawson's* right to a share of certain estates, that then this legacy shall go to *Eleanor Dawson*. Upon which it is urged, that it has not been shewn, that *Eleanor Dawson* has received her share of the estates referred to in the codicil.

But I am of opinion, that it was the intention and meaning of this testatrix by that codicil merely to declare, that *Eleanor Dawson* should not be hindered, obstructed, or impeded in obtaining the benefit of the estates referred to, by any positive or active interference of the legatee *Margaret R. Clerklee*; and not that *Margaret R. Clerklee* should actually aid and assist *Eleanor Dawson* in obtaining her rights, and see that she received her full share of those estates. And consequently, that it lays upon the defendant *Eleanor Dawson* to prove, that her right has, in fact, been contested; and that she has been hindered and prevented by *Margaret R. Clerklee* from obtaining her full share of the estates spoken of in the codicil. So far, however, from there being any proof of that kind, the testimony is full and conclusive, to the extent it goes, that she has met with no impediments whatever; but on the

contrary, has had every assistance, that could be given, or was necessary ; and has, in fact, recovered her full share of those estates wherever it appears she had required or demanded it. There is then not the least foundation, in point of fact, for this defence resting upon the conditional bequest over to *Eleanor Dawson*.

The defendant *Elizabeth Clerklee*, having attained her full age, is now in a situation to demand and receive that proportion of this legacy which has vested in her. By her answer she avers, that she has nothing to do with this bill as a defendant ; and prays that it may be dismissed, and such other benefit afforded her as may seem meet. All persons having the same interest, should stand on the same side in the suit ; but if any one, identified in interest with the plaintiff, refuses to appear as a plaintiff, he may be made a defendant, by stating in the bill that he refused to concur as plaintiff, or by stating the nature of his interest, as in this instance. (*t*) For it is well settled, that the court not only may, but must as a duty, decree between co-defendants, where the matter comes fully before it, and a case is fully made out between them ; so that the whole controversy may be finally and at once closed. (*u*) Therefore the defendant *Eleanor Dawson* will, in addition to the shares of this legacy due to the plaintiffs, be directed to pay this share now due to her co-defendant *Elizabeth Clerklee*.

It now sufficiently appears, that of the six children of the late *Margaret R. Clerklee*, four have been entitled, according to the terms of the bequest, to take the whole of this legacy in case the two, who are now infants, should die under age and before they have been married ; and consequently as to those two-sixth parts of this legacy it is now ascertained, they must certainly go to the two infants, on their becoming qualified to take ; or equally among the four in whom the interest in the legacy has already vested. And therefore these children have now such a contingent interest in the preservation of those two shares as entitles them to ask the aid of this court in having them placed in a state of security until the happening of those events which are to determine to whom they are to be paid.

As between these plaintiffs and the defendant *Eleanor Dawson*, and also between her and her co-defendants, the children of the

(*t*) Calvert on Parties, 11.—(*u*) *Chamley v. Lord Dunsary*, 2 Scho. & Lefr. 709, 718 ; *Taliaferro v. Minor*, 2 Call. 190 ; *Harmood v. Oglander*, 8 Ves. 123 ; *Colegate D. Owings' Case*, 1 Bland, 404.

late *Margaret R. Clerklee*, the whole case as to the right to the two-sixths of this legacy, as well as regards the great peril in which they now stand, considering the misconduct of the late trustee *William Dawson* ; and the sinking condition of his estate has been fully made out by the pleadings and proofs ; and therefore, I conceive it to be my duty to have those two shares brought into court and invested in some secure and productive form for the benefit of those of these children of *Margaret R. Clerklee*, who may eventually become entitled to them.

As to the nomination of a trustee to make such investment, and the kind of security in which it shall be made, I shall expect to have the suggestions of the parties when the auditor shall have made a report as directed.

The late trustee *William Dawson*, in his life-time, distinctly admitted, that the proceeds of the sale he had made of the stock in which this legacy had been invested, and some interest since the death of *Robert Clerk*, his co-trustee, as before mentioned, (the amount of which interest to be now ascertained by proofs to be laid before the auditor,) amounted to the sum of £2,406 14s. 2d. sterling. And therefore, this defendant *Eleanor Dawson*, his executrix, must be charged with the principal of that amount for the benefit of these legatees. One-sixth part of that amount has vested in each one of the daughters of *Margaret R. Clerklee* who is now of full age or has been married. And consequently, from the time the share so vested and became payable, the trustee, being in default, must be charged with interest thenceforward on the sum awarded to the claimant. And the trustee must be charged with interest on the whole sum from the death of *Margaret R. Clerklee* until a share vests ; when a due proportion of the whole is to be awarded to the claimant with interest ; and then the trustee charged with interest on the residue of the principal until the next share vests, when a proportion of the whole is to be awarded to the claimant with interest from that date, and so on until the whole legacy is disposed of. But as it is admitted, that the share which vested in *Ann Russell Contee* has been satisfied, the trustee must be credited for that as of the day of the death of *Margaret Russell Clerklee*.

It has not been distinctly shewn either in the pleadings or proofs when *Margaret R. Clerklee* died ; nor when any of the daughters, who survived her, attained their full age or married. I shall therefore send the case to the auditor to state an account from the

pleadings and proofs in the case, and such other proof in relation to these points as the parties may lay before him.

In the event of the death of either or both of the now unmarried infant daughters before they become entitled to take, her or their share or shares will devolve upon the other sisters, if living, or, upon the legal representatives of those who may be then dead; on which event it may become necessary to bring the new parties and interests before the court by a supplemental bill, or some other correct course of proceeding.

Whereupon it is *Ordered*, that this case be and the same is hereby referred to the auditor, with directions to state an account accordingly from the pleadings and proofs now in the case, and such other proofs as the parties may lay before him. And each party is hereby allowed to take testimony in relation to the said matter of account before any justice of the peace; or before the commissioners in the city of Baltimore, on giving three days notice as usual. Provided that the said testimony be taken and filed in the chancery office on or before the fifteenth day of June next.

In obedience to this order the auditor made a report as of the 19th of September, 1829, in which he says, that he had examined the proceedings, and from them had stated an account A between the defendant *Eleanor Dawson* as executrix of *William Dawson*, deceased, and the children of *Margaret R. Clerklee*, deceased, in which the proceeds of sale of the stock, \$9,202 94, which was originally purchased with the principal legacy bequeathed by *Ann Russell*, deceased, in trust for said children, as the said proceeds are ascertained by the deposition of *Frederick Dawson*, are apportioned agreeably to the said order.

From this account A, it appears, that there is due to the complainants *Edmund H. Contee*, and *Eleanor Russell* his wife, the sum of \$2,636 38; with further interest on the sum of \$1,713 79, part thereof, from this date until paid. To *Josias Hawkins*, and *Caroline Ashton* his wife, the sum of \$2,741 23, with further interest on the sum of \$1,993 14, part thereof, from this date until paid. To *Elizabeth Clerklee*, the sum of \$2,803, with further interest on the sum of \$2,037 63, part thereof, from this date until paid. To *Margaret Clerklee*, who has lately attained her full age, the sum of \$2,836 24, with further interest on the sum of \$2,594 91, part thereof, from this date until paid. And to *Sarah Emily Clerklee*, payable on her arrival at age or marriage,

a like sum of \$2,836 24, with further interest on the sum of \$2,594 91, part thereof, from this date until paid.

But the auditor is informed, that the admissibility of the deposition of the said *Frederick Dawson*, will be objected to on the part of the complainants. And he has, agreeably to instructions from the complainants' solicitor, stated another account B, which is predicated upon the letter of the said *William Dawson*, deceased, in his life-time, to *James Clerklee*, dated on the 9th of July, 1818. In this letter the said *William Dawson* states the amount paid to his banker, for principal of said legacy, and some interest thereon. The sum paid for interest is nowhere stated, except in the exhibits accompanying the aforesaid excluded deposition. And as this omission is to be attributed to the laches of the defendant, the auditor has thought it proper to charge the whole of the aforesaid amount of \$10,696 48, as received for principal of said legacy.

From the account B, it appears, that there is due to *Edmund H. Contee*, and *Eleanor R.* his wife, the sum of \$3,064 24, with further interest on the sum of \$1,991 92, part thereof, from this date until paid. To *Josias Hawkins* and *Caroline A.* his wife, the sum of \$3,186 11, with further interest on the sum of \$2,316 61, part thereof, from this date until paid. To *Elizabeth Clerklee*, the sum of \$3,257 90, with further interest on the sum of \$2,600 77, part thereof, from this date until paid. To *Margaret Clerklee*, the sum of \$3,296 52, with further interest on the sum of \$3,016 03, part thereof, from this date until paid. And to *Sarah Emily Clerklee*, payable on her arrival at age or marriage, the like sum of \$3,296 52, with further interest on the sum of \$3,016 03, part thereof, from this date until paid.

On the 16th of December, 1829, the plaintiffs filed the following exceptions to this report of the auditor: *first*, because the account A, as stated and reported, is founded upon the deposition of *Frederick Dawson*, who is not a competent witness; *second*, if he be competent as a witness, that his deposition is in contradiction to other evidence in the cause, and to the acts and admissions of the late *William Dawson*, and ought not to have been relied on by the auditor; *third*, because the account B, as stated and reported by the auditor, is the true account between the parties.

And on the 22d of the same month, the defendant *Eleanor Dawson* filed the following exceptions to this report of the auditor; *first*, because the principal sum charged in each account, is greater

than the proof and proceedings in the cause warrant; *second*, because there is a charge of interest in said account, whilst none is justified by the said proof and proceedings; or if any interest should be charged, because the same is charged at too great a rate; and because there is a charge of compound interest; *third*, because if liable to interest at all, it was only from the death of *Mrs. Clerklee*, which was on the 23d of November, 1818, and the same is calculated from the 15th of October, 1818; *fourth*, because no allowance is made for the expenses charged by the bankers, in England, to the trustees of the legacy, and paid by them; *fifth*, because no allowance is made for the loss upon that portion of the legacy invested by *William Dawson*, in the stock of the City Bank of Baltimore; but his estate is charged with the whole sum so invested; *sixth*, because no credit is given for the amount of the legacy loaned to *Mrs. Clerklee*; *seventh*, because said report and accounts are in many other particulars erroneous and not warranted by the proof and proceedings in the case.

26th January, 1830.—BLAND, Chancellor.—This case standing ready for final hearing, and having been submitted, without argument, the proceedings were read and considered.

On reviewing the order of the 14th of April last, and considering the proofs taken under it, as reported by the auditor with his statements, it appears, that a question has arisen, which was not at all contemplated by the reasoning and explanations with which the case was sent to the auditor.

The late trustee *William Dawson*, in his letter of the 9th of July, 1818, speaking of the sale of the British stocks, in which the legacy had been invested, says ‘that by the advance in the price of the funds, and some interest since the death of *Major Clerk*, the amount paid to my banker, is £2,406 14s. 2d. sterling.’ When this case was last under consideration, there was no proof by which the allusion of this expression, ‘and some interest, since the death of *Major Clerk*,’ could be shewn to apply to any other than the dividends arising from the investment made by the trustees; and which, belonging to *Margaret R. Clerklee*, as tenant for life of the legacy, could not be awarded to those of her children who were parties to this suit. I therefore directed the amount of such interest to be ascertained by proof, to be laid before the auditor; and that the defendant *Eleanor Dawson* should be charged with the principal of the amount for which the British stock sold; intending thereby to exclude from the sum to be divided among these lega-

tees in remainder all interest or dividends received by the trustees from the investment, and to which *Margaret R. Clerklee* had become entitled.

But it now appears by an account between the late trustees and their agent, reported by the auditor as part of the proofs laid before him, that a large amount of interest on the legacy of £1,500 had accumulated in the hands of the executors of the testatrix *Ann Russell*, which had been paid by them, with the principal, to the trustees who had invested the whole accordingly as capital, after deducting the costs and charges of the transaction. These additional facts give rise to the objection, that the interest, which accrued upon the legacy from the death of the testatrix to the time of the investment, belonged exclusively to *Margaret R. Clerklee* the tenant for life; and, not being a part of the capital, directed to be invested, must be deducted from the amount which the late trustee *William Dawson* acknowledged he had received.

I conceive it to have been the intention of the testatrix to allow a reasonable time to the trustees to make an investment of this legacy as directed; and that all its accumulations in the hands of her executors, in the way of interest, were to be considered as parcels of its principal, and to be invested, as such, by the trustees when paid to them. It is true, that where there has been any unreasonable delay in making such an investment, or the tenant for life would, by being postponed until it was actually made, be materially injured, he has been allowed the accruing interest from the end of one year after the death; but here no such unforeseen or injurious delay has been alleged or shewn. (v) The testatrix gave to the late *Margaret R. Clerklee* during her life, only the dividends arising from the investment, not the interest on the sum of £1,500. There is a material distinction between the interest on money, and dividends on stock. Interest accumulates from day to day; but the dividends on stock are made payable on certain days like rent; and therefore, on the death of the tenant for life, interest would be calculated up to the very day of the death; but of dividends there could be no such exact apportionment; the amount not actually payable at the time of the death of the tenant for life, would go to him in remainder. And therefore, in general, when the interest, dividends, or profits of stock are given to one for life, nothing

passes to the tenant for life but the ordinary and proper dividends of such stock. (*w*)

It is clear, from the proofs, now adduced, that the trustees themselves, with the knowledge and acquiescence of *Margaret R. Clerklee*, the tenant for life, considered those accumulations of the legacy, which they received from the executors, as a part of its capital; and actually invested them, as such, for the benefit of all, as well for the tenant for life, as for those in remainder; and that the late trustee *William Dawson*, by the expression, 'some interest since the death of Major *Clerk*,' had no allusion whatever to any dividends to which *Margaret R. Clerklee*, the tenant for life, was exclusively entitled; but to certain accumulations of interest which had been received from the executors, and which had been invested as a part of the capital of the legacy itself. And from the whole of the proofs, it is now clear, that *Margaret R. Clerklee*, the late tenant for life, must have received all the interest or dividends to which she was in any manner entitled; and that she had received from those trustees no dividends or interest which had not then come to their hands for her use, and which they ought now to be allowed to retain. And consequently, that the sum which the late trustee *William Dawson*, specifies as the amount of the proceeds of the sale of the stock is formed altogether of that in which the capital of the legacy itself had been regularly invested; and for the whole amount of which his representative, the defendant *Eleanor Dawson*, is chargeable.

It is objected, by one of the exceptions of the defendant *Eleanor Dawson*, that if she was liable for interest at all, it could only be from the death of *Margaret R. Clerklee*, which happened on the 23d of November, 1818, and not on the 15th of October of that year. The only proof in relation to the time of the death of *Margaret R. Clerklee*, is that she died in the fall of the year 1818. The long established rule of the court, in this respect, is, that where it becomes necessary to determine the price or value of any thing, and the witnesses differ, to strike an average, and to take the mean as the true price or value, or where, as in this instance, it becomes necessary to ascertain the exact date of an event, and it is only proved to have happened within a certain designated space of time, that the medium shall be assumed as the true date

(*w*) *Wilson v. Harman*, 2 Ves. 673; *Hamilton v. Lloyd*, 2 Ves. Jun. 416; *Paris v. Paris*, 10 Ves. 185; *Witts v. Steere*, 13 Ves. 363; *Clancy's Husb. & Wife*, 387.

when it happened. And consequently, the auditor was correct in this instance, in assuming the 15th of October, 1818, as the day of the death of *Margaret R. Clerklee*.

Whereupon it is DECREED, that the statement marked B, as made and reported by the auditor, be and the same is hereby ratified and confirmed; and that all other parts of the report of the auditor, with the exceptions of the parties thereto, which are in any manner at variance with the said statement marked B, are hereby rejected and overruled.

And it is further *Decreed*, that the defendant *Eleanor Dawson*, pay or bring into this court to be paid unto the said *Edmund H. Contee*, and *Eleanor R. Contee* his wife, the sum of \$3,064 24, with interest on the sum of \$1,991 92, part thereof, from the 19th day of September last until paid or brought into court; and that the defendant *Eleanor Dawson*, pay or bring into this court to be paid unto the said *Josias Hawkins*, and *Caroline Ashton Hawkins* his wife, the sum of \$3,186 11, with interest on the sum of \$2,316 61, part thereof, from the 19th day of September last until paid or brought into court; and that the defendant *Eleanor Dawson*, pay or bring into this court to be paid unto the said *Elizabeth Clerklee*, the sum of \$3,257 90, with interest on the sum of \$2,600 77, part thereof, from the 19th day of September last until paid or brought into this court; and that the defendant *Eleanor Dawson*, pay or bring into this court to be paid unto the said *Margaret Clerklee*, the sum of \$3,296 52, with interest on the sum of \$3,016 03, part thereof, from the 19th day of September last until paid or brought into court; and that the defendant *Eleanor Dawson*, bring into this court the sum of \$3,296 52, with interest on the sum of \$3,016 03, part thereof, from the 19th day of September last until brought into court to be invested or disposed of as this court shall direct; and to be paid unto the said *Sarah Emily Clerklee*, on her attaining her full age or on her marriage; or on her death happening before either of those events, to be paid over as this court shall direct. And that the defendant *Eleanor Dawson*, pay the costs of this suit, to be taxed by the register.

From this decree the defendant *Eleanor* appealed; upon which the Court of Appeals, by verbal directions caused several accounts to be stated, which accounts and the decree of that court thereupon are as follows:

ACCOUNT C.

Dr. *William Dawson, deceased, in account with the children of Margaret R. Clerklee, deceased.* Cr.

1818. October 15.		1818. October 15.		
	For the proceeds of sale of £2,587 10s. 5d. sterling, 3 per cent. consols stock purchased with the principal legacy of £1,500, bequeathed by Ann Russell, deceased, in trust for Margaret Russell Clerklee and her children, per deposition of Frederick Dawson, and exhibits annexed, being £2,070 13s. 3d. sterling, or		\$9,202 94	
				\$1,533 82½
	By Ann Russell, wife of Philip A. L. Contee, 1-6 of legacy, ...			1,533 82½
	By Eleanor Russell, wife of Edmund H. Contee, ditto, ...			1,533 82½
	By Caroline Ashton, wife of Josias Hawkins, ditto, ...			1,533 82½
	By Elizabeth Clerklee, ditto, ...			1,533 82½
	By Margaret Clerklee, ditto, ...			1,533 82½
	By Sarah Emily Clerklee, ditto, ...			1,533 82½
			\$9,202 94	

ACCOUNT D.

The Estate of William Dawson, deceased, in account with Eleanor Dawson, his executrix.

Cr.

Dr.				1823. 22 Jan.	1826. 28 Dec.	By amount of inventory and cash received by executrix per her first account, this day passed, By amount of additional receipts charged in second account, this day passed,	
1823. 22 Jan.	To the executrix for commission on \$12,989 23, at 5 per ct. per first acc.	\$649 46				\$14,789 23	
	To ditto for funeral expenses per ditto,	200 00					
	To ditto for register's fees per ditto,	8 50					
1826. 28 Dec.	To ditto for commission on \$14,257 48, the residue of estate accounted for at 5 per cent.	714 37				12,497 48	
	To balance, ...	25,704 38				\$27,276 71	
		\$27,276 71					
1823. 22 Jan.				CLAIMS.	DIVIDENDS.		
	To the executrix for sundry claims paid by her in full per first account, For her claim allowed to be retained by her per second account, ...	\$573 83					
	For sundry claims paid by her in full per ditto, ...	17,777 78					
	To James Dawson per judgment vs. executrix, ...	677 29	\$19,028 90	\$9,228 37			
	Interest from 31 Dec. 1818—4y. 22d. To Edmund H. Contee, and Eleanor his wife, per account C.	19,834 35 4,832 97	24,667 32	11,962 81			
	Interest from 15 October, 1818—4y. 3m. 7d. at 5 per cent.	1,533 82 327 43	1,861 25	902 64			
	To Josias Hawkins, and Caroline Ash-ton his wife, per ditto, ...	1,533 82 327 43	1,861 25	902 64			
	With like interest thereon, ...						
	To Elizabeth Clerklee per ditto, ...	1,533 82 327 43	1,861 25	902 64			
	With like interest thereon, ...						
	To Margaret Clerklee per ditto, ...	1,533 82 327 43	1,861 25	902 64			
	With like interest thereon, ...						
	To Sarah Emily Clerklee per ditto, ...	1,533 82 327 43	1,861 25	902 64			
	With like interest thereon, ...						
			\$53,002 47	\$25,704 38			
							\$25,704 38

ACCOUNT E.

Dr. *The Estate of William Dawson, deceased, in account with Eleanor Dawson, his executrix.* Cr.

1823. 22 January.		CLAIMS.	DIVIDENDS.	1826. 28 Dec.	By James Dawson for dividend on his supposed claim, per account D. . .	\$11,962 81
	To the executrix for additional dividends on her several claims allowed in ac- count D, ...	\$19,028 90	\$8,033 81			
	To Edmund H. Contee, and Eleanor his wife, per ditto, ...	1,861 25	785 80			
	To Josias Hawkins, and Caroline Ashton his wife, per ditto, ...	1,861 25	785 80			
	To Elizabeth Clerklee per ditto, . . .	1,861 25	785 80			
	To Margaret Clerklee per ditto, . . .	1,861 25	785 80			
	To Sarah Emily Clerklee per ditto, . .	1,861 25	785 80			
		\$28,335 15	\$11,962 81			\$11,962 81

11th July, 1832.—*Court of Appeals*.—EARL, MARTIN and ARCHER, *Judges*.—This cause standing ready for hearing, and having been argued by counsel on both sides, was fully heard and considered; and it appearing to the court, that there is manifest error in the decree of the Chancellor passed therein. It is therefore DECREED, that the aforesaid decree be and the same is hereby reversed, each party to bear their own costs in this court; and this court proceeding to give such decree in the premises as ought to have been given by the Chancellor.

It is further *Decreed*, that there is due from the appellant *Eleanor Dawson*, executrix of *William Dawson*, deceased, to the appellee *Edmund H. Contee*, and *Eleanor* his wife, the sum of \$1,861 25, with interest thereon from the 22d day of January, 1823, until paid. To the appellee *Josias Hawkins*, and *Caroline Ashton* his wife, the sum of \$1,861 25, with interest thereon from the 22d day of January, 1823, until paid. To the appellee *Elizabeth Clerklee*, the sum of \$1,861 25, with interest thereon from the 3d day of July, 1825, at which time she reached her full age of twenty-one, until paid. To the appellee *Margaret Clerklee*, the sum of \$1,861 25, with interest thereon from the 1st day of March, 1828, until paid. And to the appellee *Sarah Emily Clerklee*, the sum of \$1,861 25, with interest thereon from the 12th day of January, 1830, until paid; as the same will more fully appear by accounts C and D herewith filed.

And it is further *Decreed*, that out of the assets of the said *William Dawson*, deceased, now in the hands of the said appellant *Eleanor Dawson*, executrix of the said *William*, the said appellant *Eleanor Dawson*, do pay to the said *Edmund H. Contee*, and *Eleanor* his wife, the sum of \$922 64, with interest thereon from the 22d day of January, 1823, until paid. To the said *Josias Hawkins*, and *Caroline Ashton* his wife, the sum of \$902 64, with interest thereon from the 22d day of January, 1823, until paid. To the said *Elizabeth Clerklee*, the sum of \$902 64, with interest thereon from the 3d day of July, 1825, until paid. To the said *Margaret Clerklee*, the sum of \$902 64, with interest thereon from the 1st day of March, 1828, until paid. And to the said *Sarah Emily Clerklee*, the sum of \$902 64, with interest thereon from the 12th day of January, 1830, until paid; and that the said appellant *Eleanor Dawson*, pay to the said appellees respectively, all the costs incurred by them in the Court of Chancery in the prosecution of this suit; including the costs of the audit in this court.

And it is further *Decreed*, that the said appellant *Eleanor Dawson*, executrix of *William Dawson*, deceased, pay to the said appellees *Edmund H. Contee*, and *Eleanor* his wife, *Josias Hawkins*, and *Caroline Ashton* his wife, *Elizabeth Clerklee*, *Margaret Clerklee*, and *Sarah Emily Clerklee*, respectively, the residue of the sums of money with interest, which are herein before respectively adjudged to them out of any assets of the said *William Dawson*, deceased, which since the date of her last administration account have come, or may hereafter come into her hands as executrix or otherwise.

And it is further *Decreed*, that the said *Eleanor Dawson*, executrix of *William Dawson*, deceased, pay into the Court of Chancery to the credit of this cause, the sum of \$3,929, with interest thereon until paid in, from the 22d day of January, 1823, agreeably to account E, herewith filed. And in case *James Dawson*, his executors, or administrators, shall establish his claim, in this cause mentioned, against the estate of the late *William Dawson*, to the satisfaction of the Chancellor within a reasonable time, to be limited by the Chancellor, then, that the said sum shall be paid over to the said *James Dawson*, his executors, or administrators; but in case the said *James Dawson*, his executors, or administrators, shall not establish his claim as aforesaid, then that the said sum shall be distributed by the Chancellor equally among the said appellees *Edmund H. Contee*, and *Eleanor* his wife, *Josias Hawkins*, and *Caroline Ashton* his wife, *Elizabeth Clerklee*, *Margaret Clerklee*, and *Sarah Emily Clerklee*.

And it is further *Decreed*, that this cause be and the same is hereby remanded to the Court of Chancery. And the said appellant *Eleanor Dawson*, executrix of *William Dawson*, is hereby required from time to time to account for all further assets of the said *William Dawson* which, since the date of her second administration account, have come or shall hereafter come to her hands as executrix aforesaid, or otherwise; which shall be distributed under the Chancellor's direction in conformity with this decree. And the Chancellor is hereby authorized to pass all such orders as from time to time may be required to carry this decree into effect.

After which, *Eleanor Contee*, *Josias Hawkins* and wife, *Margaret Clerklee*, *Elizabeth Clerklee*, and *Sarah E. Clerklee*, by their petition, exhibiting therewith, a certified copy of this decree of the Court of Appeals, stated that since the passing of that decree, *Edmund H. Contee* had died, whereupon his interest had survived

to the petitioner *Eleanor Contee*; whereupon they prayed, that the defendant *Eleanor Dawson* might be compelled to pay into this court the sum of money aforesaid, with all interest due thereon; that a reasonable time might be appointed for *James Dawson*, or his representatives to exhibit their claim; and that she be required to render an account of all assets which have come to her hands since the date of her second administration account, and to bring in the same for distribution, and for general relief.

28th September, 1832.—BLAND, Chancellor.—It may be well here to observe, that when an appeal is taken from any order or decree of this court, the original record itself remains here; and, as directed by the acts of assembly, a transcript only is transmitted to the Court of Appeals; nevertheless, as before that is done, the party must put upon the record of this court his prayer, or direction for an appeal, the Chancellor is thereby officially informed of the fact. But, in such cases, where the Court of Appeals affirms or reverses the order or decree of this court, or remands the case, as in this instance, with directions that further proceedings be had; or where any thing is left open for the action of this court, after the decision of the Court of Appeals, it has always been usual, and is deemed necessary and sufficient, as the original record remains here, that the party who asks this court again to act, should do so by a petition, exhibiting therewith a copy of the order or decree of the Court of Appeals, thus officially apprising the Chancellor of what had been done in such a manner as to enable him correctly to regulate his further proceedings accordingly. (x) Upon this petition it is, therefore, in obedience to the said decree of the Court of Appeals,

Ordered, that the said *Eleanor Dawson*, executrix of *William Dawson*, deceased, on or before the 20th day of November next, bring into this court, the sum of \$3,929, with interest thereon, until paid in, from the 22d day of January, 1823. That the term of one year from the date of this order be and the same is hereby limited, as the time within which the said *James Dawson* is allowed to establish his claim, in this case mentioned, against the estate of the late *William Dawson*. And that *Eleanor Dawson*, executrix of *William Dawson*, be and she is hereby required, to render a full account of the assets of the said *William Dawson*, which, since the date of her second administration account have come, or shall

(x) Attorney-General v. Scott, 1 Ves. 419; Dethick v. Bradbourne, T. Raym. 5; 1 Harri. Prac. Chan. 677; Bac. Abr. tit. Error, M. 2; Rawlings v. Stewart, 1 Bland, 23, note; Brown v. Brown, 1804, M. S.; Dickson v. Haffner, 1807, M. S.

hereafter come to her hands as executrix or otherwise, up to the 20th day of November next. Provided, that a copy of this order together with a copy of the foregoing petition be served on the said *Eleanor Dawson*, on or before the 20th day of October next.

These parties afterwards, by their petition on oath, stated, that the defendant *Eleanor Dawson*, had left this state; was then beyond sea; and the date of her probable return, or the certainty that she ever would return, was not within their knowledge. Whereupon they prayed, that the court would direct that their petition and the order thereupon should be published, warning the said *Eleanor Dawson* to comply therewith; or that they should have such other relief as might be deemed proper.

15th October, 1832.—BLAND, Chancellor.—Ordered, that the time limited for the said defendant's bringing into this court the said sum of money, and for rendering an account of the assets be and the same is hereby extended to the 16th day of January next. Provided that a copy of this order, together with a copy of the said order of the 28th day of September last, be published in some newspaper three times a week, for three successive weeks, before the 15th of November next. (y)

HAMMOND v. HAMMOND.

The auditor may summon a witness to attend and give evidence before him; and on his failing to do so, the court will compel him to attend and testify.—In general, pecuniary legacies bear interest from the end of one year from the death of the testator.—Where one legacy is substituted for another, the substitute will, in general, carry with it the same incidents as the original.

How far lands in possession, reversion, or remainder, in the hands of an heir or devisee, are liable for debt at common law, or by statute.—The cases in which a creditor's suit may be sustained; or in which the court will take upon itself the administration of an estate.—The form and necessary allegations of a creditor's bill.—The proper and necessary parties to a creditor's suit.—The plaintiff must have an interest in common with the other creditors; and therefore a mortgagee, or a vendor, having an equitable lien, cannot, merely as such, sustain a creditor's suit.—A creditor's suit may be engrafted on another suit having a different object.—Simple contract creditors cannot sue and recover, at law, from the heir, merely in respect of assets descended; but must file a creditor's bill.—In a creditor's suit, the parol shall not demur; and the heir or devisee may be made to account for the rents and profits.—The claims of all, or of some one of the creditors; and the insufficiency

of the personalty must be established, in order to obtain a decree for a sale of the realty.—A decree for a sale virtually takes possession of the property, and vests it in the court for distribution.—After the court has, by a decree, assumed the administration of the assets, creditors may be prevented, by injunction, from proceeding in other cases; and the executor will not be permitted, at his pleasure, to apply the assets in satisfaction of any particular claim.—How creditors and next of kin are to be notified; and how, and within what time, they may be allowed to come in.—A creditor having a lien, although he cannot be compelled to come in under the usual notice, may be made a party so as to have his incumbrance cleared away for the benefit of the other creditors.—The mode of making distribution; on what amount; and the nature of priorities.

Where a devise, for the payment of debts, is sufficient and effectual, the creditors can only come in as the will directs; but if it be insufficient or ineffectual, it is fraudulent and void as against them.—The personal estate, being the natural fund for the payment of debts, if the heir or devisee pay the debt, he may obtain reimbursement from the personalty.—How far an infant is bound by his answer by guardian *ad litem*.—The cases in which interest is allowed, and the mode of computing it.—According to the terms of the devise, in this case, it was held that the contribution of the devisees should be in proportion to the actual value of the property given to each.

THIS bill was filed on the 29th of October, 1827, by *Thomas Hammond, Philip Hammond, George W. Hammond, John Hammond, and Charles Hammond*, against *Rezin Hammond, Elizabeth Hammond, Matilda Hammond, Harriet Hammond, and Philip H. Mewburn*. The bill states, that the late *Philip Hammond* made his will, on the 6th of August, 1822, and soon after died, seized and possessed of a large real and personal estate; that by his will, he gave particular portions of his estate to each of the parties to this suit, upon the terms specified; that he emancipated some of his slaves; that he directed certain parcels of his real estate to be sold for the payment of his debts; and appointed his wife, the defendant *Elizabeth*, with the defendant *Rezin*, and the plaintiffs *Charles and Thomas*, his executors.

The only dispositions of this testator's will, that are, at all, material to this controversy are the following, in which, among other things, he says: 'to my son *Charles Hammond*, and his heirs for ever, I give and bequeath the following negroes, *to wit, Andrew, Dinah*, and her daughter *Amy*,' &c.; and again he says, 'to my daughter *Harriet Hammond*, and her heirs for ever, I give and bequeath the following negroes, *to wit, Margaret and Rose*,' &c. And he then concludes his will in these words. 'I will and direct, that all the residue of my lands in Anne Arundel county, which have not been devised by me to my children, nor grandchildren, be sold by my executors, and the moneys arising from the sales thereof, be applied to the payment of my debts, and should there be more than

will discharge my debts, then I give the surplus that may be over, to my wife *Elizabeth Hammond*; but in case the moneys arising from the sales of said property should not be sufficient to discharge my debts, then I direct that my executors pay the balance of my debts from my estate generally; and from the rents and profits thereof; and I request, and will, that they give bond for their payment; and that no administration on my estate be had in the ordinary manner; but that the property devised to my sons and daughters and to my grandson, shall contribute in equal proportions to the discharge of my debts, to be applied and used in such manner as my executors may deem most advisable and beneficial.'

After which, on the 19th of October, 1822, he added a codicil to this will, in which he made some other dispositions of his property, and concluded in these words, 'I devise and direct, that all the rest and residue of the lands which I purchased of the *Miss Hoods*, after deducting therefrom the part above devised to my son *John* and his heirs, shall be sold by my executors, and the proceeds thereof applied to the payment of my debts. It is my will and desire, and I do hereby direct and devise, that all debts due me by bond, note, open account or otherwise, with the exception of the mortgage debt due by *John W. Dorsey*, and which I have herein before devised to my daughter *Harriet*, shall be assets in the hands of my executors to be applied to the payment of my just debts, and whatever surplus there may remain, I give and devise to my wife *Elizabeth Hammond*. Whereas in and by said will I have bequeathed to my son *Charles* three negroes, named *Dinah*, *Amy*, and *Andrew*, and to my daughter *Harriet* two others, named *Margaret*, and *Rose*; since which time I have parted with all property in said negroes, I do therefore, in lieu of the said devises, give and bequeath to my said son *Charles* the sum of \$700, and to my said daughter *Harriet* the sum of \$300 respectively.'

The bill further states, that after the death of the testator his will was proved; that the executors therein named obtained letters testamentary, giving security to pay all debts and legacies according to law, and have acted accordingly; that the testator's personal estate would not be sufficient to pay his debts; and, that *Henry Hammond*, one of the devisees, had, since the death of the testator, died without children, and unmarried. Whereupon it was prayed that an account be stated so as to shew how the estate of the testator had been disposed of by his executors; and what

amount, if any, of his debts yet remained unsatisfied; that the several devisees might be compelled to contribute according to the requisitions of the will, to such of the debts as yet remained unsatisfied; and that the plaintiffs might have such other relief as the nature of their case might require.

The defendant *Rezin* by his answer admitted, that, in the manner as stated, he had taken upon himself the office of one of the executors of the will of the late *Philip Hammond*, in which the devises and bequests had been made as set forth in the bill; that he had collected several sums of money, and had taken into his possession some of the personal estate of the testator; that he had stated an account with the plaintiff *Charles* and the defendant *Elizabeth*, from which it appeared, that he had paid \$300 more than he had received; and that he was then ready and willing to account. The defendant *Elizabeth*, by her answer, admitted the facts as stated in the bill; and averred, that no part of the assets had come to her hands as executrix. The infant defendants *Matilda*, *Harriet*, and *Philip*, answering by their guardian *ad litem*, said, that they had no knowledge of the matter, and submitted their interests to the protection of the court.

The plaintiffs put in a general replication to these answers; upon which a commission was issued, and testimony taken and returned. After which the case was brought before the court, that a decree to account might be passed by consent.

27th August, 1828.—BLAND, Chancellor.—This case standing ready for hearing and being submitted, the proceedings were read and considered. Whereupon it is DECREED, that the auditor take an account of the real and personal estate of the late *Philip Hammond* which came to the hands of the said *Elizabeth Hammond*, *Rezin Hammond*, *Thomas Hammond*, and *Charles Hammond*, as executors or otherwise of the late *Philip Hammond*; and of the manner in which the same may have been administered or distributed. And also an account of the debts due and owing from the said late *Philip Hammond* at the time of his death which are yet remaining unpaid. And that the auditor state said accounts from the pleadings and proofs now in the case, and from such other evidence as the parties may have taken before him, or have taken before any justice of the peace, on giving three days notice as usual, and lay before him.

After which the case was brought before the court to have the creditors of the testator called in, for the purpose of having the assets properly administered, and of making a final settlement and distribution of the estate.

17th September, 1828.—BLAND, Chancellor.—Ordered, that the creditors of *Philip Hammond*, late of Anne Arundel county, deceased, file the vouchers of their claims in the chancery office on or before the 17th day of January next. And that a copy of this order be inserted in some newspaper or newspapers once in each of three successive weeks before the 17th day of October next.

The object of this suit being to adjust the rights and liabilities of the respective parties, as claimants under the will of *Philip Hammond*, deceased, it was obviously liable to abate by the death of any one of them, whose interest did not survive or fall into the common stock for the benefit of any one or all of the others; although as regarded the creditors of the deceased, it was to be treated as a mere creditor's suit. Therefore, on the death of the plaintiff *Philip Hammond*, the surviving plaintiffs filed a supplemental bill of revivor against his widow *Juliana Hammond*, and his infant children *Philip Hammond*, *Marianna Hammond*, *Harriet Hammond*, *Edward Hammond*, and *Cecelia Hammond*; who all answered and admitted the facts as stated in the bill.

The auditor reported, that in consequence of the imperfect state of the accounts and vouchers of the defendant *Rezin*, who was one of the executors, he had taken unusual pains to prepare his account; that he, the auditor, had made a statement, to make a report of which to the court, the affidavit of *Rezin* was necessary; that several days had been appointed for him to appear and verify the statement; but he had failed to do so; from which, and his conduct the auditor alleged, that he was convinced he should be unable to report any account unless *Rezin* should be compelled to attend.

8th August, 1829.—BLAND, Chancellor.—It having been made the duty of the auditor to state such accounts as the Chancellor may direct; and as he has, for that purpose, been clothed with authority to administer an oath to all witnesses and persons proper to be examined upon such accounts; (a) it necessarily follows, that, here as in England on a reference to a master, where an exe-

(a) 1785, ch. 72, s. 17.

cutor, as in this instance, or other party has been decreed or ordered to account, he may be called before the auditor and examined on oath upon interrogatories in relation to such account. The answers of a party to interrogatories being, in such case, considered in the nature of an answer to the bill, may, in the same way, be excepted to for insufficiency. And such party may be compelled by attachment, if necessary, to attend before the auditor, and to answer as required. (b)

Ordered, that the said *Rezin Hammond* forthwith attend before the auditor, and give such information and testimony, or make such affidavit as may be deemed pertinent and necessary to enable the auditor to state such an account as he has been directed to state, or the nature of the case may require; provided, that a copy of this order be served on the said *Rezin Hammond*.

The auditor on the 25th of August, 1829, filed his report of the accounts which he had stated in obedience to the decree of the 27th of August, 1828, in which he set forth, that the overpayments of *Charles*, *Thomas*, and *Elizabeth*, amounted together to \$2,047 29; and that there was due from the defendant *Rezin* \$555 19; that the outstanding claims against the testators, as then shewn, amounted to \$3,086 29; that *Charles* and *Harriet* claimed to have their legacies charged against the general fund, which, if allowed, would leave the sum of \$5,908 39 to be provided for; that, assuming this as the amount to be raised from the estate, he had stated the amount of contribution with which the respective devisees were chargeable; that there was a debt due to the estate amounting to \$605 with interest and costs, which had not then been collected; and of the parcel of land devised to be sold for the payment of debts, there remained one hundred and fifteen acres yet to be disposed of; neither of which items had been included in his estimate of the estate.

To this report of the auditor the defendant *Rezin* excepted; because *Charles* and *Harriet* had been allowed their legacies out of the general fund to the prejudice of the other devisees.

The parties *Thomas*, *Charles*, *Rezin*, and *Elizabeth*, as executors of the late *Philip Hammond*, by their petition stated, that a judgment had been recovered against them, and their sureties, on their bond, as executors, for the use of *Nicholas G. Ridgely* for

the sum of \$471 36, with interest and costs, it being a debt due from their testator; and that *Ridgely* had sued out a *fieri facias* against them. Whereupon they prayed that he might be restrained from proceeding at law, &c.

On the 29th of September, 1829, an injunction was granted as prayed.

The plaintiffs, with the leave of the court, on the 28th of October, 1829, so amended their bill as to make *Ann Hammond*, the wife, and *Matthias Hammond*, *Denton Hammond*, *Susan Hammond*, and *Ann Hammond*, the infant children of the defendant *Rezin*; and *Harriet Hammond*, the wife, with *Henry Hammond*, *Thomas Hammond*, and *Margaret Hammond*, the infant children of the plaintiff *John*, parties to this suit, on the ground of their having an interest in the estate of the testator under his will. The adult defendants put in their answers, and the infant defendants answering by their guardian *ad litem* to this amended bill, admitted all the facts as set forth by the plaintiffs.

On the 7th of November, 1829, the parties filed the following agreement: 'Whereas there is a cause now depending in the Court of Chancery, for the settlement of the estate of *Philip Hammond*, deceased; and it is ascertained, that the estate specially devised by said *Hammond*, for payment of debts, is insufficient for that purpose; and whereas there is some doubt whether the contribution provided for by the will, should be made by the devisees of said *Hammond*, equally, or in proportion to the value of the property severally devised to them. It is, therefore, agreed, in order to save expense, that said doubt shall be submitted to the Chancellor. And in case the Chancellor should determine that the said contribution shall be borne by the said property in proportion to its value, then the property devised to *Thomas Hammond*, shall be estimated to be worth \$10,000; the property devised to *Charles Hammond*, shall be estimated to be worth \$10,000; the property devised to *Henry Hammond*, shall be estimated to be worth \$10,000; the real property devised to *John Hammond*, shall be estimated to be worth \$2,000; the property devised to *George W. Hammond*, shall be estimated to be worth \$10,000; the property devised to *Rezin Hammond*, shall be estimated to be worth \$10,000; the property devised to *Matilda Hammond*, shall be estimated to be worth \$10,000; the property devised to *Harriet Hammond*, shall be estimated to be worth \$10,000; the property devised to *Philip Hammond, Jr.* shall be estimated to be worth

\$10,000; and the property devised to *Philip H. Mewburn*, shall be estimated to be worth \$10,000. It is also agreed, that no advantage shall be taken of any alleged defect in the bill, in not charging, that *Charles* and *Harriet Hammond*, are entitled to have their pecuniary legacies raised by contribution.'

22d December, 1829.—BLAND, *Chancellor*.—This case standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

It has been urged, that the sums of money given to *Charles* and *Harriet* are merely pecuniary legacies, payable only out of the surplus after debts and specific legacies. It is alleged in the bill and admitted, that the personal estate of the testator is inadequate to pay his debts; hence it follows, that those sums of money given to *Charles* and *Harriet*, cannot be paid, unless, like the devises and bequests of the original will, they are to be considered as specific legacies, only chargeable with a proportional contribution for the payment of the debts, which the funds appropriated for that purpose by the testator, was insufficient to pay.

In questions of this kind, it is declared by all the authorities, that the intention of the testator is always to prevail, unless it contravenes some established rule of law. It is evident, from the general character of the testamentary instrument under consideration, that the late *Philip Hammond*, by his will, had designed to dispose of his whole estate, of every description, in a very especial manner. His wife, each one of his children, and his grandson, are named and provided for, by a donation of what he manifestly had estimated as a due proportion of his property. And each share is given, in a manner, so carefully guarded, as clearly to shew, that the whole subject had been pondered over and well considered. Whether each one of the dividends, so made, was, in fact, of equal value is of no importance, as regards the present question. After the testator had thus established the proportions, in which the first and chosen objects of his bounty should take, he then gives to five of his slaves their freedom, with small pieces of property for their support during their lives; and then, in conclusion, he provides for his creditors: but, in doing so, he cautiously guards against disturbing the equilibrium he had established among his devisees, by expressly declaring, that in case the fund, so set apart for his creditors, should not be sufficient, 'that the property devised to my sons and daughters, and to my grandson, shall contribute in equal proportion, to the discharge of my debts.'

From this clause, and the general tenor of the will, there can be no doubt, that every devise, and every bequest, including the emancipation of his slaves, for the gift of freedom to a slave, is a most precious specific legacy, are all of them specific legacies which can, in no manner, be made abateable or reducible by any deficiency of the testator's personal estate ; but, in case of any deficiency of that which he has designated as the creditors' fund, the several devisees, charged with contribution, might be compelled to contribute toward the satisfaction of the testator's debts to the whole amount of the property given to them, before the donations to the wife and freed slaves, who are not so charged, could be at all molested. Indeed it seems to be admitted, that the intention of the will, to this effect, is so unequivocally clear as not to leave room for the smallest doubt upon the subject.

But the testator, by his codicil, informs us, that he himself had broken in upon the proportionate distribution which he had previously made with so much precision, and which he had manifested so much solicitude to preserve, by parting with some of the negroes he had given to his son *Charles* and his daughter *Harriet*, and then says, 'I do therefore, in lieu of the said devises, give and bequeath to my said son *Charles* the sum of \$700, and to my said daughter *Harriet* the sum of \$300, respectively.'

From which it clearly appears to have been the intention of the testator to restore, in all respects, the proportions which had been thus disturbed ; and that the money, so given, should take the place, and stand in lieu of the negroes in those shares from which they had been withdrawn ; and that he intended to declare, that as the negroes had been given as specific legacies, subject only to contributions in the event and manner designated, so those sums of money should, in like manner, be deemed and taken as specific legacies, attended with the like benefits, and subject to the same extent of contingency and incumbrance, and no more.

I am therefore of opinion, that these sums of money, given to *Charles* and *Harriet*, should have been paid by the executors in the first instance, as specific legacies, out of the fund set apart by the testator for the payment of his debts, as, in fact, not forming any part of it ; since it cannot be inferred from any thing said by him, that they were to be paid from any other portion of his estate. And that then each division, charged with contribution, must contribute, as prescribed by the will, to the payment of such debts as remain unpaid from that fund, after those two legacies have been

deducted from it. In so far as the executors, into whose hands a sufficiency of assets came to satisfy those two legacies failed to do so, they are chargeable with a *devastavit*; and consequently, they alone are liable for the whole amount, principal and interest; and the legatees cannot be allowed to take the place of creditors and have the amount raised by contribution from the devisees.

It is, in general, true, that pecuniary legacies bear interest from the end of one year after letters testamentary have been granted, allowing that time for the executors to collect the effects of the deceased. (c) In this instance, there appears to be an additional reason why interest should be allowed from that time on these legacies; and that is, their having been expressly declared to be in lieu of certain specific legacies which, if they had not been withdrawn, should have been delivered immediately, and could have been at once made profitable to the legatees; thus indicating it to have been the intention of the testator himself, that interest should be allowed as a substitute for the profits of the slaves in lieu of which the money was given; since it is in general, true, that where one legacy is substituted for another, the substitute will be attended with the same incidents as the original. (d) I am therefore of opinion that interest on these sums has been correctly charged.

It is alleged, that the whole fund, set apart by the testator for the payment of his debts, will not be sufficient for that purpose; and it is upon the truth of this fact, that the plaintiffs claim to have the assets accounted for by the executors; to have the amount of the unsatisfied claims against the deceased ascertained; and to have the other devisees compelled to contribute to the payment of such debts, according to the terms of the will. Although all the executors, and the legatees *Charles* and *Harriet*, as such, with all the devisees who have been charged with contribution by the will, have been made parties to this bill; yet it is not alleged, that the suit has been instituted generally for the benefit of those interested in the correct distribution of the real or personal assets of the testator; or for the benefit of those creditors and others who may have an interest in the fund appropriated by the testator for the payment of his debts. The bill contains no distinct and express allegation, that the plaintiffs had instituted this suit, as

(c) *Maxwell v. Wettenhall*, 2 P. Will. 26; *Pearson v. Pearson*, 1 Scho. & Lefr. 11.—(d) *Chatteris v. Young*, 6 Mad. 31; S. C. 3 Cond. Cha. Rep. 72.

well for the benefit of creditors as of themselves ; and yet the case has been hitherto so conducted as if it were by positive allegation and in its nature a creditor's suit.

The defendants have urged, that there is nothing in the pleadings, as amended and aided by the agreement filed on the 7th of November last, which can warrant these plaintiffs in assuming the position of creditors ; or which can give them a right to have their complaint considered as a creditor's suit, under which they could, as has been done, give notice, in the usual manner, to the creditors of *Philip Hammond*, deceased, to come in and participate in the distribution of this fund. To answer this objection, and for the purpose of obtaining a clear view of the whole subject, I shall take this occasion to consider the nature of a creditor's suit more at large, than the questions now presented, may seem to require.

The estate of a deceased person must be first applied to the payment of his debts, leaving the residue only to go, as directed by his will, or as the law has provided in cases of intestacy. But as the person who takes out administration of his estate, in most cases, cannot know who are his creditors, and may not know who are his next of kin ; and the administration of his estate may be exposed to great delay and embarrassment ; the Court of Chancery has long exercised a most wholesome jurisdiction, in such cases, for the prevention of delay and embarrassment ; and for the assistance and protection of the representatives of the deceased, by assuming the administration of his estate. (e) With these views ; and, for the purpose of securing the fund, and of doing equal justice to all, this court will take upon itself, the general administration of the assets of a deceased debtor, either at the instance of one or more of his creditors, (f) or legatees, (g) or next of kin ; (h) or on a bill filed by an executor ; (i) or a trustee of the testator's estate, for direction or indemnity in the payment of debts. (j) And it will, in like manner, in some cases, assume the distribution of the estate

(e) *David v. Frowd*, 7 Cond. Chan. Rep. 8.—(f) *Douglas v. Clay*, 1 Dick. 393 ; *Paxton v. Douglas*, 8 Ves. 520 ; *Terrewest v. Featherby*, 2 Meriv. 480 ; 1798, ch. 101, sub ch. 8, s. 7 ; 1802, ch. 101.—(g) *Brooks v. Reynolds*, 1 Bro. C. C. 183 ; *Drewry v. Thacker*, 3 Swan. 544 ; *Jackson v. Leaf*, 1 Jac. and Wal. 229 ; *Clarke v. Ormonde*, 4 Cond. Chan. Rep. 47.—(h) *Waite v. Temple*, 1 Cond. Cha. Rep. 162 ; *Greig v. Somerville*, 4 Cond. Cha. Rep. 453 ; *Conway v. Green*, 1 H. & J. 151 ; 1718, ch. 5, s. 3 ; 1798, ch. 101, sub ch. 14, s. 6.—(i) *Perry v. Phelps*, 10 Ves. 39.—(j) *Lecch v. Leech*, 1 Cha. Ca. 249 ; *Brooks v. Reynolds*, 1 Bro. C. C. 183.

and effects of a living insolvent debtor among his creditors. (*k*) The foundation upon which this jurisdiction seems to rest, is the principle, that equality is equity; and that its proper application requires the interposition of the peculiar powers of a Court of Chancery, (*l*) as well for the benefit of creditors, as for the protection of the representatives of the deceased debtor; (*m*) either because the assets of the deceased are, or may, if not placed in safety and correctly administered, be insufficient to satisfy all; or because it is necessary for the legatees, or secondary claimants, who can obtain nothing until the creditors, or primary claimants or incumbances have been first called in and satisfied; (*n*) or because the debtor, though alive, being insolvent, has no more than a certain amount to be distributed rateably among his creditors; or has by a deed of composition specially appropriated all his estate and effects for the satisfaction of all his creditors, who all come in accordingly; (*o*) which property is likely to be misapplied, or wasted by the debtor or holder of it; or that the parties to the deed of composition are too numerous to be made parties to such suit. (*p*) The sole or principal object of bills in equity for any of these purposes being the satisfaction of creditors, they are emphatically called creditors' suits; and are, for the most part, governed by rules common to them all. (*q*)

By the common law, lands in the hands of the heir, were liable to bond creditors only, where the heir was specially bound; and even to that extent, as they had no lien upon the real estate descended, the heir was only personally liable, in respect of and to the value of the real assets descended; and, therefore, a bond creditor could make no claim against such real estate in the hands of a *bona fide* purchaser for a valuable consideration without notice. (*r*) But even a bond creditor could not recover his debt of the heir, if he

(*k*) *Atherton v. Worth*, 1 Dick. 375; *Downes v. Thomas*, 7 Ves. 206; *Weld v. Bonham*, 1 Cond. Cha. Rep. 361; *Gray v. Chaplin*, 1 Cond. Cha. Rep. 454; *Newton v. Egmont*, 6 Cond. Cha. Rep. 265; *Strike's case*, 1 Bland, 94; *Williamson v. Wilson*, 1 Bland, 430.—(*l*) *Martin v. Martin*, 1 Ves. 211.—(*m*) *Kenyon v. Worthington*, 2 Dick. 669; *Perry v. Phelps*, 10 Ves. 40; *Drewry v. Thacker*, 3 Swan. 543.—(*n*) *Clarke v. Ormonde*, 4 Cond. Cha. Rep. 47.—(*o*) *Atherton v. Worth*, 1 Dick. 375.—(*p*) *Downes v. Thomas*, 7 Ves. 206; *Weld v. Bonham*, 1 Cond. Cha. Rep. 361; *Gray v. Chaplin*, 1 Cond. Cha. Rep. 451; *Williamson v. Wilson*, 1 Bland 430.—(*q*) It has been provided by a late act of assembly, that in certain cases, a creditor's bill may be filed against a corporation, 1832, ch. 306, s. 4.—(*r*) 1 Eq. Ca. Abr. 149; *Coleman v. Winch*, 1 P. Will. 777; *Mathews v. Jones*, 2 Anstr. 506; *Craig v. Baker*, ante 238.

had aliened the land before an action was brought, or of a devisee of his debtor at any time. (s) To prevent this wrong and injury to creditors, it was declared by an English statute, passed in the year 1691, that the heir should be liable to the value of the land descended to, and aliened by him; and that all devises should be void, as against creditors; who should have the same right to sustain an action of debt against such devisee, that they could have had against the heir. (t) But as the relief, given by this statute, is confined to those cases only where the creditor may recover by *action of debt*; the common law, in other respects, remains unaltered; so that no *damages* can be recovered of a devisee of the land, for a breach of *covenant* made by the devisor. (u) This English statute has been expressly recognized as one of the legislative enactments of our code; (w) and, consequently, where a creditor's suit is brought to charge any lands so devised, the heir as well as the devisee, must be made a party; because it is the statute alone which makes the land assets in the hands of the devisee; and that requiring the heir to be made a defendant at common law, the bill in this court must follow the remedy therein prescribed. (x) But if the bill alleges, that the testator left no heirs,

(s) *Solley v. Gower*, 2 Vern. 61; *Plunket v. Penson*, 2 Atk. 291; *Ex parte, Moreton*, 5 Ves. 449; Bac. Abr. tit. Heir and Ancestor, F.—(t) 3 W. & M. c. 14.—(u) *Wilson v. Knubley*, 7 East. 128.—(w) 1797, ch. 113.—(x) *Gawler v. Wade*, 1 P. Will. 99; *Galton v. Hancock*, 2 Atk. 432.

ORCHARD v. SMITH.—This bill was filed on the 31st of August, 1738, by John Orchard, Robert Pearle, William Cumming, and Jonathan Davis, against John Smith and Mary his wife, and Peter Hoggins. The bill states, that Gunder Erickson, deceased, being, in his life-time, possessed of a considerable real and personal estate, and being, at the same time, indebted to sundry persons, in order to pay his debts, in case his personal estate should fall short, on the 17th of March, 1728, by his last will devised as follows: 'It is my will and desire, that a certain tract of land belonging to me, lying on Rock Creek, called Norway, containing six hundred and thirty acres; and another tract of land containing two hundred acres, called Garden's Delight; likewise two houses and lots in Nottingham, in Prince George's county; and my right to a house and lot in Queen Ann Town, all be sold in order to discharge the debts I owe;' and then appointed his wife, the defendant Mary, his sole executrix; that in a short time thereafter he died; that she, Mary, caused the will to be proved; but renounced the administration thereof; whereupon letters of administration, with the will annexed, were granted to the defendant Hoggins, who acted as such accordingly; that the deceased was indebted to the plaintiff Orchard, in the sum of £13 ls. 6d. current money; to the plaintiff Pearle, in the sums of 4,246 lbs. of tobacco, and £28 5s. 0d.; that they severally sued the administrator Hoggins, who pleaded that he had fully administered, whereupon they obtained judgments against him therefor, when assets should come to his hands; that the deceased was indebted to the plaintiff Cumming, in the sum of 2,638 lbs. tobacco; that

or none who are citizens or residents of this state, then, following the provisions of the act of assembly, as to suits at common

the defendant Mary afterwards married the defendant Smith; who have hitherto refused to sell the said lands, unless they be compelled and justified in doing so by a decree of this court. Whereupon it was prayed, that the said lands, or so much thereof might be sold, as would be sufficient to pay the deceased's debts and the costs and charges of the person empowered to sell the same.

On motion of the defendant Hoggins, by his solicitor, it was *Ordered*, that the said name of Peter Hoggins be struck out of the said bill of complaint.

The defendants Smith and wife, by their answer, admitted that Gunder Erickson, deceased, did make his will, as in the bill mentioned, and that on the defendant Mary's renouncing the executorship, administration was granted to Peter Hoggins; that the said Erickson, by his will, devised to the defendant Mary, in fee simple, half of the tract of land on which he lived, in lieu of her dower, which she accepted as such; that after the marriage of these defendants, the plaintiff Cummings, and Robert Tyler, bond creditors of the deceased, sued these defendants, as devisees, and recovered judgments against them, by virtue whereof they paid to the said Cumming 3,357 lbs. tobacco, and to the said Tyler 9,602 lbs. tobacco; that the defendant Mary, was ready to do what the court should direct for the sale of the said land, and had not refused to do what was right therein, consistent with her security and safety as trustee; but these defendants insisted that the bond debts, due from the deceased, which they had paid, together with the costs, should be allowed to them out of what should be raised by a sale of the said lands; that they were strangers to, and ignorant of, the claims of the plaintiffs against the deceased; and therefore no more should be allowed to those creditors than what might appear to be justly due; and these defendants hoped that, as the defendant Mary was only a trustee involuntary, the costs and charges expended by them in this suit might be paid to them, in the first place, out of the moneys arising from the sale of the lands devised to be sold.

May, 1739.—It was *Ordered*, in presence of the counsel on both sides, that there should be a hearing of the said cause the next court on bill and answer.

30th October, 1739.—OGLE, Chancellor.—This case coming on to be heard in presence of counsel on both sides, the complainant's bill and the defendant's answer thereto being read, appeared to be as the same, are hereinbefore recited and set forth.

Whereupon it is *Decreed*, that the lands and premises mentioned in the said bill to be devised for payment of the debts of the said Gunder Erickson be accordingly sold by the master to the best bidder, and that the master for that purpose give public notice, by causing printed advertisements to be set up in the most public places, of such intended sale; and also, that the said master cause public notice, in like manner to be given, that all the creditors of the said Gunder Erickson should come in and prove before the said master their respective debts, before the 28th day of February, or that, in default thereof, such creditors will be excluded from any share or proportion of the produce arising by the sale of the said lands and premises, and this court doth further *Decree*, that the money or tobacco arising by such sale shall be applied by the master, in the first place, for the payment of the complainants' and defendants' costs of this suit; and all other necessary charges and expenses in the sale of the said lands and premises, and performance of this decree; and in the next place, to the payment of all debts whatsoever due from the said Gunder Erickson, in proportion, which shall be proved before the said master, before the 28th day of February; and then, if any money or tobacco shall remain, after payment of the said costs, charges, and expenses and debts, the same shall be applied for the payment of

law, (y) the creditor may, on stating the fact, proceed against the devisee alone, with the executor or administrator of the deceased, if there be any such personal representative.

But the statute of 1691 is confined to cases, where a debtor devises his real estate away from his creditors, and leaves them to chance to obtain satisfaction of their debts, enriching third persons at their expense. And therefore, the devising of an estate for the payment of debts takes the case out of the statute; and leaves the debt to stand as it would have done before, so that the creditor can come upon the real estate only in such manner as the will directs. The mere inconvenience of the mode prescribed by the testator for the payment of his debts will not bring the devise within the statute; provided the fund be ultimately sufficient; and the gift of the estate for the payment of debts has been made in an effectual and practicable manner, so as to answer the purpose. (z) In all such cases the real estate thus made liable, is held to have been thereby converted from *legal*, into *equitable* assets, because of its being so made assets in equity where they would not be so at law; and also, because of there being no mode of administering such assets but in a Court of Chancery; (a) where, upon principles of equity, it is held, that specialty creditors can only be allowed to

the said 3,357 lbs. tobacco, and 9,602 lbs. of tobacco, and the costs of suit mentioned in the said answer of the defendants John Smith and his wife; and if any surplus shall, after such several payments, remain, the same shall be subject to the further directions of this court. And this court doth further *Decree*, that the said John Smith and his wife shall, upon oath, produce before, and leave with, the master, what title deeds they, or either of them, may have in their, or either of their possession relating to the said land and premises; and that the said Mary Smith, as executrix named in the will of the said Gunder Erickson shall execute, according to law, such deeds and conveyances of the lands and premises to the purchaser or purchasers thereof as to the said master shall seem proper; so that the same shall not contain any clause or warranty to affect, bind or charge the said defendant Mary Smith, or any estate belonging to her, in her own right; and that the said Mary Smith be indemnified therein by virtue of this decree; and that all parties, as well as any creditors, have leave to apply, from time to time, to this court for further directions in the execution of this decree.

After which, the case having been again brought before the court,

February, 1740.—OGLE, *Chancellor*.—Upon motion, it is *Ordered*, that the creditors of Gunder Erickson have further time till the 26th of March next to prove their respective debts before the master.—*Chancery Proceedings, lib. J. R. No. 4, fol. 89 to 94, and 163.*

(y) 1797, ch. 113.—(z) *Hughes v. Doulbin*, 2 Cox, 170; S. C. 2 Bro. C. C. 614; Pow. Mortg. 69, 325.—(a) 2 Fonb. 403.

come in, *pari passu*, with simple contract creditors; and moreover, that notwithstanding the infancy of the heir or devisees, the lands may, without allowing the parol to demur, be immediately sold for the benefit of all the creditors. (b) This construction and qualification of this English statute has been virtually affirmed by the act of assembly which authorizes the Chancellor, where lands are devised to be sold for the payment of debts or other purposes, and there is no person appointed to execute the trust; or the person appointed neglects or refuses to do so, to appoint a trustee, to order a sale, and to apply the proceeds accordingly. (c) And although the application under that act of assembly is always made *ex parte*, yet, if the object be to pay debts, it is treated, in all the subsequent proceedings, as a creditor's suit; such as ordering notice to be given to the creditors of the testator to bring in their claims and the like. (d)

(b) *Newton v. Bennet*, 1 Bro. C. C. 136; *Lingard v. Derby*, 1 Bro. C. C. 311; *Powell v. Robins*, 7 Ves. 209; *Bailey v. Ekins*, 7 Ves. 322; *Shiphard v. Lutwidge*, 8 Ves. 26; *Leigh and Dal. Equ. Conver.* 10, 13.—(c) 1785, ch. 72, s. 4.—(d) *Ex parte Margaret Black*, 1 Bland, 142, note.

Ex parte, BOONE.—This petition was filed by Charles Boone and others on the 13th of May, 1791; it states that the late Stephen Boone, by his last will, had directed his lands to be sold, and the proceeds to be divided among the petitioners; but had appointed no person to make the sale. Whereupon it was *Decreed* that a trustee be appointed, &c. &c. who made and reported a sale accordingly.

25th January, 1792.—HANSON, *Chancellor*.—*Ordered*, that the report of Gabriel Duvall, trustee for the sale of the real estate of Stephen Boone, deceased, be approved; and that his proceedings, and the sale therein mentioned, be approved, ratified, and confirmed; unless cause shall be shewn to the contrary on or before the fifth day of next February term.

No cause having been shewn, the case was submitted to the court.

9th June, 1792.—HANSON, *Chancellor*.—*Ordered*, that the sale be absolutely ratified, &c., and that the said trustee may assign any of the bonds by him taken, on the said sale, to such person or persons as is or are entitled to an assignment agreeably to the decree of this court, and the will of the said Stephen Boone.

Upon the petition of Margaret Howard, and the exhibit, therewith filed, the case was again brought before the court.

9th June, 1795.—HANSON, *Chancellor*.—*Ordered*, that Gabriel Duvall, trustee for the sale of the real estate of Stephen Boone, deceased, do assign and deliver unto John Merriken, the guardian of the said Margaret Howard, appointed by the Orphans Court of Anne Arundel county, the bond taken by the said trustee, on the sale of the said estate, of Gassaway Watkins, with Zachariah Duvall and Ephraim Duvall, sureties for the principal sum of five hundred pounds, dated 22d July, 1791; and that the said trustee assign the said bond to the said guardian in trust for the said Margaret Howard, after having endorsed the same, if required, with the affida-

In England, where a debt is secured by specialty, by which the debtor binds himself and his heirs for the payment of the debt,

vit by law required, for enabling the said Merriken to support an action at law on the said bond, in his own name.

Ex parte, TONGUE.—This petition, filed on the 1st of February, 1794, states, that the late Richard Cowman died seized of certain real estate, a part of which he directed to be sold for the payment of his debts; and appointed his executors Ann Cowman, Thomas Tongue, and Joseph Cowman, with power to sell, &c.; that Ann Cowman is dead; and that a sale is necessary to pay the debts of the deceased. Whereupon it was prayed that a trustee be appointed to make sale, &c.

10th July, 1794.—HANSON, *Chancellor.*—On the said petition, and the last will and testament of Richard Cowman, therewith exhibited, it is *Decreed*, that the petitioners, Thomas Tongue and Joseph Cowman, be, and they are hereby appointed trustees for selling the lands of the said Richard Cowman, which, by the said last will and testament, the executors are authorized to sell; and that they, or the survivor of them, in case of the death of either, have full authority to sell such part of the said lands as they shall think necessary; and that the manner and course, &c. (in the usual form, concluding thus) And the said trustees or trustee, at the time of giving notice of the sale, shall give the like notice to the creditors of the said Richard Cowman, to exhibit their claims, with the vouchers thereof, to the Chancellor, within three months from the time fixed by the said trustees or trustee for the first sale.

After which, a sale was made, reported, and ratified accordingly.

Ex parte, BERRY.—On the fourteenth of May, 1796, Jeremiah Berry filed his petition to have a trustee appointed to sell the real estate of the late Benjamin Berry, according to the provisions of his will. A decree was passed accordingly, on the same day, appointing Edward Nicholls trustee for that purpose; who, after having sold a part of the estate, left this state, went to England, and had not returned. Whereupon, the purchaser, John S. Brooke, by his petition, prayed that another trustee might be appointed to convey the land to him, &c.

14th May, 1803.—HANSON, *Chancellor.*—The Chancellor has considered the petition of John Smith Brooke, this day filed; and it appears to him, that, if the facts therein stated, be true, justice requires that the prayer of the petition ought to be granted, by appointing a trustee in the room of the trustee who hath gone out of the jurisdiction of this court. Relief, indeed, might perhaps be obtained on Brooke's filing a bill against the heirs of Benjamin Berry, stating every thing which hath taken place under and since the decree; but it appears to the Chancellor notwithstanding, that the appointment of another trustee not being injurious to any party whatever, unless to the absent trustee, who ought, long since, to have completed his trust ought to be made; the Chancellor being authorized to appoint a trustee or trustees.

It is *Decreed*, that Alexander C. Magruder be, and he is hereby appointed trustee, with full power to do any act which, by the decree in this cause, the said Edward Nicholls is authorized to perform, and which he hath not performed; and particularly, that the said Magruder, on the said Brooke's paying to him the purchase money, with interest, of the land of Benjamin Berry, to the said Brooke, by the said Nicholls sold, or producing to him to be here filed, receipts in writing for the said purchase money, with interest, from the parties entitled, by the order of this court, to receive the said money when here brought in, shall, by a good deed, ac-

such bond creditor may file a bill in behalf of himself and other bond creditors against the heir and devisee with the executor or administrator of the deceased, to obtain satisfaction of their claims

knowledge, and to be recorded according to law, convey the said land to the said Brooke, as by the original decree, Nicholls is directed to convey. *Provided*, that, before the said Magruder shall act as trustee, he shall file a bond to the state of Maryland, executed by himself, and at least one surety, approved by the Chancellor, in the penalty of eighteen hundred dollars, conditioned for the faithful performance of the trust reposed, or hereafter to be reposed in him by the Chancellor; and *provided*, too, that if the said Nicholls hath not departed out of the jurisdiction of this court, every thing herein contained shall be null and void. In case the said Magruder be authorized to complete, and shall complete the said trust, he shall be allowed a commission of five per cent. on the amount of the sale. And whereas the quantity of the land sold to Brooke is uncertain, the said Magruder is hereby authorized to ascertain the same, and whatever reasonable expense is by him incurred, in so doing, shall be allowed.

And it is further *Ordered*, that the sale made by the said trustee Edward Nicholls, be absolutely ratified, no cause having been shewn, &c. although notice, &c. And it is *Ordered*, likewise, that the auditor of this court state the application of the money arising from the sale, agreeably to the directions of the said Berry's last will, deducting first the costs of suit and a commission of one and a half per cent. to the aforesaid trustee, who, it appears, hath left the state without completing his trust. Before the auditor can state as aforesaid, he must ascertain from proof, who are the persons entitled to said money.

Ex parte, ZIMMERMAN.—This petition, filed on the 6th of July, 1802, states that the late George Beckenbaugh, by his last will, directed that his wife and children should be supported out of the rents and profits of his real and personal estate, until his real estate could be sold to advantage, without loss to his wife and children; that the proceeds of the personal estate are wholly insufficient for the support of the widow and children; that the land might be then advantageously sold; but that no person had been appointed to make the sale. Whereupon it was prayed that a trustee might be appointed to make the sale, &c.

6th July, 1802.—HANSON, *Chancellor*.—*Decreed*, in the usual form, that the land be sold, &c.

After which, a sale was made, reported, and ratified accordingly.

Ex parte, CONWAY.—This petition, filed on the third February, 1803, stated that the late George Conway, by his last will, directed 'that said executrix shall make over and convey unto whomsoever may become a purchaser of fifty acres of land, it being part of a tract or parcel of land called and known by the name of Aldridge, beginning, &c., and apply the money arising thereby as the rest of my personal estate, heretofore mentioned.' And, after some legacies, he gave all the remainder of his personal estate to be equally divided amongst his five children, &c. The petition further stated that the executrix died without having made sale, &c.

3d February, 1802.—HANSON, *Chancellor*.—*Decreed*, that the land, in the proceedings mentioned, be sold, and that Thomas Cromwell be appointed trustee to make the sale, &c.

A sale was accordingly made and reported.

from the personalty, if sufficient to pay all, or by a sale of the realty, if the personal estate be insufficient. (e) And even if the bill be filed by one bond creditor only for the satisfaction of his own particular debt, the constant course, in England, is to direct an account of all the bond debts of the testator or intestate, with liberty to come in for satisfaction; without which no decree for a sale can be, for as they have all a lien against the heir, who is bound as well as the ancestor, they are all entitled to receive satisfaction; and might otherwise sue at law notwithstanding the decree for a sale; but it would be very mischievous should the court suffer another bond creditor, who has not obtained judgment, after a decree for a sale, to proceed against the estate, as the effect of a sale could not be had during the continuance of the *levari* on the judgment which must be removed in order to a sale. (f) But as bond creditors have an election to sue and obtain satisfaction from the executor, or the heir, at common law, it is not often, in England, that they proceed in equity; unless it be to have a discovery and account of the rents and profits of the realty, or to obtain some other advantage which they cannot have at law. (g)

16th April, 1803.—HANSON, *Chancellor*.—*Ordered*, that the sale be absolutely ratified, notice, &c. &c., and that the auditor make a distribution of the money according to the will of said Conway, filed in this cause, subject to the control of the Chancellor.

After which, the trustee brought into court the sum of £228 15s. 0d. arising from the sale of the said estate.

20th April, 1803.—HANSON, *Chancellor*.—*Ordered*, that the register receive the same, and, with the treasurer's leave, deposite it in the Western Shore Treasury, to be applied agreeably to the order this day passed. Whatever there may be paid for interest is to be divided among the persons entitled to receive the principal.

N. B. The money lodged is, 3 bank notes of \$20; 12 of \$5; 20 of \$10; and 290 silver dollars, which is equal to £228 15s. 0d.

The auditor, having made and reported a distribution of the proceeds of sale, the case was again submitted.

23d April, 1803.—HANSON, *Chancellor*.—*Ordered*, that the money arising from the sale of the real estate of George Conway be applied agreeably to the auditor's report; that is to say, that there be paid to each of the five heirs therein mentioned, or his or her legal representatives, the sum of £40 11s. 10d.; and that the residue be applied to the discharge of costs and commission, &c., agreeably to the auditor's statement. If one of the five heirs be dead, and the others are his representatives, the part of the deceased is to be divided among the others.

(e) *Joseph v. Mott*, Prec. Chan. 79; *Anonymous*, 3 Atk. 572; *Mould v. William-son*, 2 Cox, 386.—(f) *Marten v. Marten*, 1 Ves. 214.—(g) *Curtis v. Curtis*, 2 Bro. C. C. 633.

By a British statute, passed in the year 1732, and which appears to have been introduced and practised under here so early as the year 1740, it is expressly declared, that the real estate of a debtor shall be assets for the satisfaction of all just debts, duties or demands of what nature or kind soever, in like manner as real estates are by the law of England, liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies for seizing, extending and selling the same, and in like manner as personal estate. (*h*) From which, it would seem, to be impossible to avoid coming to the conclusion, which has been so perfectly well settled in regard to bond creditors, that a suit, at common law, under the positive provisions of this statute, might be sustained by a simple contract creditor, as well as by a bond creditor, against the heir, grounded merely on the fact of real assets having descended to him. Yet it appears to have been always held, that this statute should not be so construed as to authorize such a suit on that foundation alone by a simple contract creditor; and it has been adjudged accordingly, that a simple contract creditor cannot sustain an action of assumpsit against the heir merely in respect of real assets descended; although he might maintain such an action if the heir had, in respect of such assets, made an express promise to pay. (*i*) The reason of a construction apparently in such direct opposition to the express letter of this statute, requires some explanation.

At common law, lands were liable in the hands of the heir for the debts of his ancestor, due by specialty, in which the heir was bound; and they were also made liable by several English statutes giving an extent or *elegit*, which had been adopted here, (*j*) before the introduction of the statute of 1732, making lands in the colonies liable to be taken in execution for debt. In England a bond creditor, after the death of his debtor, might sue the executor, or the heir separately at common law; or he might file a bill in equity against both, in which suit all the specialty creditors of the deceased might come in and participate. But although the common law, after lands were made liable to be taken in execution for debt

(*h*) 5 Geo. 2, c. 7; Davidson's *Lessee v. Beatty*, 3 H. & McH. 612; Lands in England have been since made liable for simple contract debts, by a statute passed in the year 1834, 3 and 4 W. 4, c. 100; Calvert on parties, 152; Ram. on assets, 226; Putnam v. Bates, 3 Cond. Cha. Rep. 355.—(*i*) Preston v. Preston, 1 H. & J. 366; Lodge v. Murray, 1 H. & J. 499; Gist v. Cockey, 7 H. & J. 135.—(*j*) Kilty Rep. 143, 144, 151; 1715, ch. 23, s. 6.

by extent, statute staple, and *elegit*, seems to have relaxed in favour of the creditor so far as to let him in indifferently on the real or personal fund at his election, it provided no means of determining how the burthen should be borne as between the heir or terre-tenant and the personal representative of the debtor. Here, therefore, equity stepped in; and considering the common law remedy against the heir, and the statute provisions against the land as instituted only for the sake of preventing the creditor from sustaining a total loss of his debt; and that, therefore, the ancient common law notion, that the land should be considered only as a dernier security for a debt to which the heir became subject on the contract, in respect of real assets, if the personal assets failed, furnished the true principle on which an adjustment ought to be made, between the heir and executor, founded an equity upon that common law notion; and thereupon substituted the heir in the place of the creditor, and fixed the debt on the personal assets, if sufficient, making the personal, as between the heir and executor, exonerate the real estate. In which respect the Court of Chancery, acting in conformity with its principles, that in all cases, where there is a measuring cast between an executor and an heir at law, held, that the latter should have the preference. Therefore, although a creditor by specialty may, at law, sue either the heir or executor, and shall have the benefit of his security against the one or the other, at his election; yet if the heir or devisee be charged in debt, where the executor has assets, the former may ultimately compel the latter, in equity, to pay the debt; unless he can shew some special exemption by the act of his testator upon which he ought to be discharged. (*k*)

After the adoption here of the statute of 1732, subjecting lands to the payment of debts, the phraseology of the writ of *fieri facias* was altered so as to authorize the levying of it upon the goods and chattels, *lands and tenements*, of the debtor; and the statute was thus directly put into operation against living debtors according to its very letter. But it was soon perceived, that a statute, so extensive in its bearing, could not be, in any similar way, literally applied to the estates of deceased debtors in the hands of their heirs, without creating much confusion in the administration of such estates; and without putting it in the power of each sim-

(*k*) Powel Mortg. 777, 779; Armitage v. Metcalf, 1 Cha. Ca. 74; Wolstan v. Aston, Hardr. 511; Clifton v. Burt, 1 P. Will. 680; Edwards v. Warwick, 2 P. Will. 175; Galton v. Hancock, 2 Atk. 435.

ple contract creditor to have the estate collusively seized and sold, in fraudulent exclusion of other creditors; or so as to operate injuriously upon the interests of others, and particularly upon the heir by compelling him to seek reimbursement from the personal estate, which was the primary fund for the payment of debts. And therefore, those principles of equity by which the rights of bond creditors had been so far modified and controlled as, in many cases, to do equal justice to all creditors; and so as, at once, to the full value of the personalty, to protect the realty in the hands of the heir, were so followed out, in the construction of this statute, as not to permit a simple contract creditor to maintain an action at common law, at all, against the heir merely in respect of the real assets descended; but to compel him to go immediately into a court of equity against the heir, together with the personal representative of his deceased debtor, so as to enable the heir to protect himself, without any circuitry of judicial proceeding; and to save the realty, by having the personal estate first applied to the satisfaction of the debts; and to do justice to all the creditors by allowing them to come in according to their respective priorities; or for their due proportions. The adoption of these principles, and the giving of this construction to this statute, necessarily threw the administration of all real assets into the Court of Chancery; and gave a new and very enlarged scope to a creditor's suit.

Such must have been the course of proceeding, in all cases, under this statute, after the death of a debtor, as well where his heir was of *full age*, as in those cases where he was a *minor*; (l) for, if it were not so, then a simple contract creditor, as he was not allowed to sue at law, could, before the year 1818, have had no recourse against the real assets in the hands of *adult* heirs in any way whatever; since prior to that time, the only act of assembly in relation to the matter, being merely intended to prevent delay in proceeding against *infants*, (m) this British statute which had made such real estate assets for the payment of debts, would have been, thus far, virtually nullified. (n) This matter has, how-

(l) *Cox v. Callahan*, ante 51, note.—(m) 1785, ch. 72, s. 5.

(n) *TYSON v. HOLLINGSWORTH*.—This bill was filed, on the 25th of May, 1801, by Nathan Tyson and others, creditors of Thomas Parkin and Francis McKenna, partners trading under the firm of Parkin & McKenna, against Jesse Hollingsworth and Rachel his wife, Susannah Goodwin and James Carey. The bill states that the firm of Parkin & McKenna had contracted debts to a considerable amount with the plaintiffs, as appeared by the promissory notes of the firm therewith exhibited; that

ever, been put to rest by a positive legislative enactment, which declares, that the previous laws in relation to the sale of real

Thomas Parkin, by his last will, devised all his estate, real and personal, to the defendant Rachel, his mother, and appointed her his executrix, and soon after died; that she was, at that time, above twenty-one years of age; and on her refusing to act as executrix, letters testamentary, with the will annexed, were granted to the defendant Susannah; that, afterwards, Francis McKenna made his last will, by which he appointed the defendant James Carey, his executor, and soon after died; upon which the defendant Carey, qualified as his executor. The bill further states, that Thomas Parkin and Francis McKenna, at the time of their death, were considerably indebted, as appeared by the accounts of the defendant James Carey, passed before the Orphans Court, and exhibited as a part of the bill; and that all their partnership effects and personal estate were insufficient to discharge their debts; and that the whole of their partnership effects, and their personal estate, had been exhausted in the payment of his debts; and that there remained then, due from the estate of Parkin & McKenna, to the plaintiffs, a considerable sum of money; that the testator Francis, left no real estate; that the testator Thomas, held, at the time of his death, ten shares of bank stock, which had passed into the hands of his administratrix, the defendant Susannah; that he had died unmarried, and without issue, seized of real estate; but left no brother or sister of the whole or half blood; nor any issue of a brother or sister; nor did he leave a father; and that his mother, who was his heir at law, claimed the real estate left by him, as his devisee; and had taken possession, and received the rents and profits thereof accordingly. Whereupon it was prayed the defendants Jesse and wife might account for the rents and profits of the real estate; that the defendants Susannah and James, might account for the personal estate of their respective testators, and that the real estate devised to Rachel might be ordered to be sold, &c.

The defendant Carey, by his answer, said that he had passed an account as executor, before the Orphans Court, and distributed a large amount in payment of debts due from the firm of Parkin & McKenna, leaving considerable sums still due, &c.

The defendants Hollingsworth and wife, and Susannah Goodwin, by their answer, objected to the accounts of the defendant James Carey, as passed by the Orphans Court, in many particulars; and averred that, if all the effects had been fully accounted for, and applied by him, there would have been assets sufficient to pay all; or, at least, leaving a small balance due; and they say they do not know, or admit, that the debts stated in the bill are due; and they put the plaintiffs upon the proof thereof. These defendants admit the other facts as set forth in the bill, &c.

A commission was issued to take testimony, and returned with sundry depositions, documents, and admissions of the parties; from all which, the indebtedness to the plaintiffs was established substantially as charged; but the insufficiency of the personal estates of the deceased debtors; or of the separate personal estate of Thomas Parkin, deceased, was in no other manner averred in the bill than as stated above, or shewn by the proofs, than by the accounts of the defendants Carey and Goodwin, which they had passed before the Orphans Court.

30th December, 1803.—HANSON, *Chancellor*.—This cause standing ready for hearing, and being appointed, with notice to all parties, to be heard this day; and the counsel for the defendants being absent; and the cause being thereupon submitted by the complainant's counsel, the bill, answers, exhibits, depositions, and all other proceedings were, by the Chancellor, read and considered.

Whether or not, in case of a deficiency of assets in the hands of the executor or administrator, this court can decree a sale of a real estate devolving on a person of

estates held by *infant* heirs or devisees shall be extended to defendants of full age. (o)

full age, hath heretofore been considered doubtful. In fact, there has been no such decree in this court. And in one case, where creditors, several years since, filed a bill against the heir of full age, who, by his answer, expressed his willingness to have the land sold for paying all the creditors, the Chancellor refused to execute the power. He has since often reflected on the subject, and thought that, in that case, he might be wrong. For, inasmuch as an executor or administrator is suable in this court, on the ground of discovery, and land is, in this state, liable for all debts, as well as the personal estate, there seems no reason wherefore an heir should not be sued on the same ground. Indeed, this very case shews the propriety of this court exercising the jurisdiction. Here is a dispute between the executor of one partner and the administrator of the other partner, and an heir and devisee, as well as between them all and the creditors: and if the creditors were referred to a remedy at law, it would be almost, if not altogether, impracticable to obtain it. But here, if the Chancellor be right in his present opinion, the remedy is easily attainable; all parties being compellable to account, in order to shew what is the amount of real and personal assets, as well as to shew what are the just claims against the deceased; and the interference of this court being obviously to the advantage of all parties.

It is *Decreed*, that the defendant James Carey, shall account for the personal assets in his hands, as executor of Francis McKenna, surviving partner of Parkin & McKenna, both in the right of the said McKenna alone, and of McKenna as surviving partner aforesaid. That the said Susannah Goedwin, as administratrix, with the will annexed, of Thomas Parkin, shall account for the assets in her hands. That the auditor of this court shall state the said accounts, &c. He shall state the several claims of the complainants, &c.

And inasmuch as it appears that the claims of the complainants, although not yet precisely ascertained, will require a sale of the real estate in the bill mentioned, and the complainants have expressed their wish and consent, that the Chancellor decree an immediate sale; it is further *Decreed*, that the said two parts of the said two tracts of land, together with the improvements thereon, be sold; that Samuel Chase, jun. be and he is hereby appointed trustee for the said sale, &c. &c.

The trustee, on the 15th of May, 1804, made sales of parts of the real estate, as directed by this decree; which sales, with the consent of the parties, were, on the 11th of October, 1804, finally confirmed; and the trustee was directed to give notice, by advertisement, to the creditors of Thomas Parkin, deceased, and of Parkin & McKenna, to file the vouchers of their claims in the chancery office, on or before the 15th of February then next. After which, the auditor reported a statement of the claims which had been brought in and established, with interest upon each up to the day of sale, leaving a large deficiency in the proceeds of sale. Upon which, a further sale was ordered.

On the 19th of November, 1804, the defendants Hollingsworth and wife, by their petition, stated that the decree had been passed in their absence; that they had no knowledge of the dormant claims against the testator Parkin; that the personal estate was sufficient to pay all; and that the last order for a further sale had been obtained by surprise. Whereupon they prayed to be heard; and that no further sale might be made, &c.

20th November, 1804.—HANSON, Chancellor.—It is true that the decree was passed

Formerly, in equity as well as at law, where a suit was brought against an infant heir, or against coparceners, any one of whom

in the absence of Hollingsworth's counsel; but it was because his counsel did not attend the appointment which had been made; and because the suit, after some delay, was submitted, without argument to the Chancellor. The Chancellor, on revision of the papers, conceives that he was perfectly correct in decreeing the real estate of the deceased to be sold; and likewise in ordering a new sale. It appears that the claims, fully established, exceed the amount of the sales several thousand dollars, and that no opposition was made by the defendants to a second sale; and that the said petition contains the only objection which has been made to the proceedings. The Chancellor saw no reason then, wherefore the second sale should not take place. However, on the petition of the said Hollingsworth, it is *Ordered*, that the sale advertised by the trustee, Samuel Chase, be postponed until further order.

As Mrs. Hollingsworth is the sole representative of Mr. Parkin with respect to both real and personal estate; and as whatever surplus of the money arising from the sale of either would belong to her, the Chancellor did not hesitate to do justice to the creditors, by passing such a decree as would provide effectually for the discharge of their claims, without injury to the defendants. Indeed he conceived that his decree was calculated to benefit the defendants, full as much as the creditors of Parkin. Suppose, for illustration, actions at law, brought by the creditors. On the papers in this cause, it is by no means clear, that when the decree was passed, the Chancellor had any power over the bank shares. If the defendants wish to apply them to the payment of Parkin's debts, they, most assuredly, can do so of their own accord. Dormant claims are such as have not been announced to the debtor, or person chargeable with them. It is not proper to call a claim against Parkin dormant, merely because it was not exhibited in this court until it was called for. In short, the Chancellor is fully satisfied of the propriety of all his proceedings in this cause, prior to the petition aforesaid. If the proceeds of the sales, already made, with what the defendants shall voluntarily apply, shall be inadequate to the discharge of all the claims here exhibited and established, the Chancellor must assuredly do his duty in directing a new sale.

On the first of February, 1805, Jesse Hollingsworth and wife filed a bill here against these plaintiffs, Nathan Tyson and others, for the purpose of having the sale of the real estate, made under this decree, annulled. The defendants answered, the case was brought to a hearing; and the bill was dismissed by a decree of this court; which decree was, on appeal, affirmed by the Court of Appeals, on the ground that the defect in a certain deed, which formed an essential link in the chain of title, had been cured by the act of 1807, ch. 52, just then passed, and while the case had been held under advisement by that court. 2 H. & J. 230.

After which, the trustee who had been appointed to make the sale, by his petition, referring to this suit, and exhibiting a copy of the decree of the Court of Appeals, prayed that the decree of the 30th of December, 1803, might be executed.

14th January, 1808.—KILTY, Chancellor.—In regard to that part of this petition which relates to the personal estate, the Chancellor is, at present, under the impression that the decree for account of the personal estate will comprehend all the assets on hand at the time of the decree, and since received up to the time of taking the accounts. The decree being confirmed, the auditor will, of course, proceed to take the accounts, after giving notice as directed thereby; and on his report it will appear what assets are unaccounted for; and such decision will be made thereon as may appear proper. The trustee will, on the affirmation which has taken place, proceed,

was an infant, in respect of the real estate descended, the parol demurred; or, in other words, the further prosecution of the suit

of course, to the collection of the money due on the sales which have been made. As to that part of the petition which is for a further sale, there might be sufficient evidence among the papers to justify an original order or decree for such further sale. But, inasmuch as by the order of the late Chancellor, of the 20th November, 1804, the sale therein mentioned was postponed till further order, and was not delayed solely by the appeal, it appears proper that the parties should be heard in support of and against the petition for the said postponement, by Hollingsworth and wife, of the 19th of November, 1804. The present petition for a further sale, will, therefore, be heard, on application, on the first day of the ensuing February term: *Provided* a copy thereof, and of this order, be served on the said Jesse Hollingsworth, or either of his counsel, appearing in the suit, before the first day of February next.

On the 29th of January, 1808, Elisha Tyson, John Heslip and others, by their petition, stated that they had each of them purchased a part of the real estate in the proceedings mentioned, the title to which had been drawn in question by the bill filed on the first February, 1805, by Hollingsworth and wife; that they had purchased upon a representation, and in confidence, that they should obtain a good title, which could not have been made to them until after the deed had been made good by the act of 1807, ch. 52; that if they had had possession, and had improved the same before that time, they must have done so at their own risk; in consequence of which, they had not taken possession of, or improved, the property so purchased by them, or derived any benefit therefrom; but that they were then willing to keep it; provided they were not compelled to pay interest on the purchase money, which the trustee threatened to make them pay. Whereupon they prayed relief, &c.

30th January, 1808.—*KILTY, Chancellor.*—The Chancellor cannot decide a matter which may be so important as to the principle and the amount on the petition as it stands. There must be either a petition or a bill, making the creditors, who were complainants in the suit, parties, as well as the trustee.

On the 2d of March, 1808, the auditor made a report, in which he says that he had stated an account between the estate of Parkin & McKenna and the trustee; that he had charged the said estate, with the amount of claims in account No. 1, including interest to the 15th of May, 1804, the time when the said sales were made, and interest on the aggregate then due to this day, and the trustee's commission; and that he had credited the estate with the amount of sales to this day, as directed by the trustee; and there appears to be the sum of \$3,871 deficient in discharging the said debts from the sales of the real estate, besides the payment of the costs arising in this court, as per account No. 2 more fully appears. He further says that he had stated another account between the said estate and the trustee, charging the said estate with the amount of claims, as stated to the 15th of May, 1804, and interest on the principal sums then due on each claim, to this day, and the trustee's commission; and credited the amount of sales and interest as aforesaid; and there is a deficiency, by this mode of statement, of \$2,287 99, as per account No. 5 more fully appears. The auditor further says that he had examined the accounts produced by the defendant Carey, the executor of McKenna; and stated an account between the said executor and the estate of Parkin & McKenna, to shew the assets which came to his hands; and there appears a balance of \$4,491 83 in his hands, of the personal estate; for which sum there has been no order of the Orphans Court for the application thereof, as per account No. 6 more fully appears. That of the said executor's accounts No. A.

was stayed until the infant attained full age ; (p) which privilege had been, by our law, extended to all infants who claimed by pur-

and B. appear to have been settled by the Orphans Court, where he has been allowed a commission on \$50,852 27, amounting to \$5,085 84. That exhibit C, is an account wherein he is charged with additional sums received, amounting to \$4,427 67; and he charges the estate with a dividend paid \$18 41; and the sum of \$105 37 for disbursements for which he has produced receipts; except for the two first items amounting to \$9 37; and it is to be observed, that out of the sums contained in this account, there has not been any commission allowed the said executor, &c.

To this report of the auditor the plaintiff excepted, impeaching the correctness and validity of the claims of several creditors. And they also excepted to the account of the defendant Carey, the executor; because he had been allowed a commission of ten per cent. on the payment of debts due from the said estate, which amounted to \$5,085 84; and yet the auditor had given him credit for the following sums of money, to which he was not entitled either in law or equity. The sum of \$17 30 paid for drayage and postage. The sum of \$176 paid James Winchester as a fee. The sum of \$5 paid Yundt & Brown for advertisement. The sum of \$8 37 paid for copies. \$90 paid John Purviance as a fee; and \$6 paid sundry printers.

On the 3d of March, 1808, the defendants Hollingsworth and wife, by their petition, objected to this report of the auditor; because, by one statement, he had allowed interest on interest, from the 15th of May, 1804, to this time. That, by another statement, it appeared that the deficiency for payment of debts was only \$2,287 99. That there appeared to be a balance in the hands of the defendant Carey, of \$4,491 83, which was more than sufficient to pay the deficiency, as shewn by either statement. Whereupon it was prayed that the defendant Carey, might be directed to bring into court, or pay into the hands of the trustee appointed to make sale of the real estate, under the decree of the 30th of December, 1803, the sum of \$3,871, which would be sufficient to meet any deficiency; and that the balance of money and property in the hands of the defendant Carey, might be paid over to the defendant Goodwin, the administratrix, who was also the trustee, to whom all the property of the defendant Rachel, had been conveyed in trust for her benefit.

3d March, 1808.—KILTY, *Chancellor*.—The Chancellor has taken up the above exceptions, on the motion of the counsel for Hollingsworth and wife, James Carey being in court, and apprised thereof. He is of opinion that the sum of \$176 and \$90 ought not to have been allowed in the manner they are charged by the Orphans Court. By the former law the court might have allowed five per cent. on the debts collected, so as to cover all extra expenses; but this was discretionary. For the defence of suits, and even the legal costs, could not be allowed without a certificate from the court; and the only mode seemed to be a contribution of the persons interested, for extra expenses. Considering the amount of the commission, in addition to these reasons, the auditor is directed to strike out these charges, retaining the others herein excepted to, and to state the balance accordingly.

With regard to the petition of Hollingsworth and wife, it does not appear to be conformable to the decree to order the money to be paid to the trustee, by James Carey. But he is directed to pay into this court, that is, to the register, at present, the sum of \$3,871, part of the balance in his hands, subject to the further order of

chase in like manner as to those who claimed by descent. (q)
Hence, as it would seem, the guardian of an infant could not, at the

the court, with liberty to pay in the residue. The other part of the petition to be decided on further consideration.

Soon after which, the case was again submitted for further directions.

8th March, 1808.—KILTY, *Chancellor*.—In this suit, in which there was a decree for the sale of the real estate of Parkin, the Chancellor, on the application of the counsel for the parties interested in the residue thereof, and on the submission of the trustee, being also the counsel for the complainants, has examined the several accounts stated by the auditor, and considered the exceptions to them.

He is of opinion that the account with the trustee, No. 5, which was stated by desire of the counsel for the defendants, is not conformable to the established practice of the court, and that justice does not require a departure from that practice so as to confirm that statement. The Chancellor is further of opinion, that the account with the trustees, No. 2. would be entirely conformable to the established principles and practice, if the amount of the claims and commissions had not exceeded the amount of the sales. The reasons for the practice are obvious. The bonds taken on the sale, being on interest, that interest ought to be applied to the interest accruing on the aggregate of the debts due at the time of sale; because, if the sale was for ready money, it could, at once, be applied to discharge those debts; and the estate, by this practice, pays no more interest than it receives. But, in account No. 2, the interest charged, as per account No. 3, is \$6,770 47; and the interest computed, as due from the purchase, to the same day, is only \$6,256 87; making a loss or difference of \$513 60. All difficulty would have been avoided if the claims had been previously ascertained, or if the amount of the sales made had been sufficient to meet or exceed them, together with the costs and commissions. As the business stands, the Chancellor is of opinion that the deficiency to be provided for by a further sale; or, in the first place, by the sum due from James Carey, as executor, of McKenna, is to be ascertained by stating an account or accounts, on the principle of the one which is prefixed to this order, which deficiency will be \$3,357 40. The claimants and the trustee being considered, at present, as entitled to interest in proportion to that which is due from the purchasers. The above deficiency will be taken as principal, to bear interest from the time of the payments made from the first sale, if a second sale should be necessary. But if the purchasers should succeed in getting a deduction of the interest, a different order must be made; and therefore it does not appear necessary that the accounts should be stated at this time, unless requested by either party. The costs of the suit are to be taken out of the next sale, or the sum in the hands of James Carey.

After which, by consent, much additional testimony was taken, returned and filed: upon all which the case was again brought before the court, and the petition, filed on the 29th of January, 1808, was again particularly presented for consideration.

12th July, 1808.—KILTY, *Chancellor*.—It is now represented that there will be a sufficiency from the payment made by James Carey, as executor of McKenna, to satisfy all the creditors; and it is stated, as an amendment to this petition of the purchasers, that Hollingsworth and wife are solely interested; and they are prayed to be made parties thereto. The trustee does not appear to consider himself bound, as such, to take any measures as to this petition; but has agreed in support of it as

instance, and for the benefit of a bond creditor of his ward's ancestor, be compelled in equity to account for the rents and pro-

counsel for the petitioners. No answer has been put in by Jesse Hollingsworth and wife; but the petition has been approved by counsel on their behalf; and there is an agreement as to the testimony to be read on the hearing. At the present term the said petition was argued, and has since, together with the testimony taken, and the proceedings under the bill filed on the 1st of February, 1805, as far as they related thereto, been considered.

The Chancellor is of opinion that the relief prayed for in the said petition ought not to be granted. The cases which were cited to shew the practice in England, are not considered as applicable to sales under the decree of this court, in which the purchase money is directed to be secured by bonds bearing interest from the day of sale; and in which the possession is generally delivered; and even in cases where possession has not been obtained until the removal of the crop, that circumstance has not been viewed as a bar to the payment of interest, without an express agreement to that effect. But the purchasers have been supposed to regulate their prices accordingly. There may be cases in which a reduction of the interest might be ordered or decreed, as where the possession could not be obtained, and the injury could be estimated with certainty. But, in such cases, the steps taken by the parties, the time of their application, and all other circumstances, would be taken into consideration; and with regard to the actual possession, the person who held it might, probably, be made to account for it, and make up the deduction to the other party.

In this case, the purchasers have not been deprived of the possession; nor have Jesse Hollingsworth and wife been benefitted by it. Without giving any opinion as to the merits of their claim, it may be said that they had a right to submit it to the decision of this court; for which, as far as the purchasers were incommoded by being made parties to the suit, they might have been recompensed in the allowance of their costs. It appears, also, some injury or loss may have been sustained by them in consequence of uncertainty as to their title which the said suit occasioned, and the influence which it had as to the improvements; but it is considered that it was in their power, by a timely application, to have got rid of this inconvenience by getting released from their purchases; or, at least, that they ought to have made their application, at that time, by bill or petition, instead of resting their claims upon the statements made in their answers. And upon such a bill or petition, their title to relief, and the manner of granting it, might have been examined and decided. It is true, they stated in their answer that they had, by the conduct of the complainants Hollingsworth and wife, been deprived of the benefit of making any improvements on the lots so purchased; and they prayed that they might not be compelled to pay interest on their respective purchases; on which part of their answer no order was taken.

The agreement for taking the testimony is certainly a very favourable one for the petitioners, as they are enabled to give evidence on their own behalf, and to state, not only the facts which took place, but their opinions and determinations as to the property, some of which could be known only to themselves. But while the fullest credit is given to the facts which are thus admitted in evidence, the Chancellor cannot ground his decision on their statement of their willingness to relinquish their purchases rather than pay interest; or, on the impressions which they have taken up on the subject. And although there is in the testimony, a difference in the cases, so that the relief, prayed, if extended to some, might not be given to others, yet there is not, in any of them, such a plain ground of equity as would justify the

fits of the real estate descended; (r) probably, because those rents and profits were allowed to the heir as a support during his minority; and as a means of preparing for his defence when he should attain his full age; or, because, upon feudal principles they were to be otherwise disposed of. (s) And therefore, after lands here had been made liable to the payment of debts, by the statute of 1732, no decree for the sale of it could be obtained for that purpose

court in taking off the interest from the debt which they contracted; nor is there sufficient evidence to entitle the petitioners to a partial relief; their claim to which cannot, with any certainty, be said to arise from the situation in which they were placed. The circumstance of the loss falling on Hollingsworth and wife, and not on the creditors, does not appear so material as to outweigh the objections which have been stated. And their conduct, in instituting the suit, not having been accompanied with any actual disturbance of the possession, could not, with justice, make them liable to so considerable a loss. The loss or injury to the purchasers was, in some degree, occasioned by their own fears, which, the event has proved, were not well founded; and they ought not to have the benefit, as far as it is such, of retaining their purchases without paying interest on the sum contracted to be paid. It is to be observed, also, that they might have paid, or offered to pay, the money into court; and that, notwithstanding the evidence respecting the readiness of the purchasers to make payment, it is not shewn that they kept the money dead by them; and it is presumed that the use of money is generally, if not always, worth the interest of it.

It is, therefore, adjudged and ordered, that the said petition be dismissed, but without costs.

On the next day the case was again brought before the court for further directions.

13th July, 1808.—*KILTY, Chancellor*.—The said petition being decided on, the auditor is directed to proceed in stating the accounts. The order of the 8th of March last was predicated on the ground of a further sale being necessary for the payment of the claims; but it being represented that the sum paid in, on account of the personal estate, will be sufficient to satisfy the creditors, in addition to the sale already made, that circumstance may, possibly, make some difference; and the auditor is, therefore, not restricted to the form or to the principles laid down in the order of the 8th March, in stating the accounts; except that the account No. 5, which was stated by desire of the counsel for the defendants, is to be rejected. The auditor will state the claims excepted to by Mr. Hollingsworth, in the same manner as if passed, for the present; because there will be a sufficiency to pay all the other creditors; and those claims can be hereafter decided on. The auditor will take into the account the money paid in by James Carey, as executor of McKenna, observing that the interest on so much of the claims must cease at the time of that sum being paid in, which will appear in the proceedings. The accounts, when stated to be reported to the court, for further orders.

The auditor reported accordingly. Some matters appear to have been adjusted by compromise, and the case seems to have soon after terminated.—*Chancery Proceedings*, 1803, fol. 699 to 577; S. C. 1 H. & J. 469.

(r) *Creed v. Colville*, 1 Vern. 172; *March v. Bennett*, 1 Vern. 423; *Waters v. Ebrall*, 2 Vern. 606; *Ward v. Cecil*, 2 Vern. 712; *Scarth v. Cotton*, Cas. Tem. Tal. 198.—(s) *Markal's Case*, 6 Co. 4; *Plasket v. Beeby*, 4 East. 485; *Chaplin v. Chaplin*, 3 P. Will. 368.

against the heirs or devisees of the debtor so long as any one of them remained under age; until, by an act of assembly, the court was authorized, where lands possessed by an infant were chargeable with the payment of money, and therefore, liable to a decree for sale, to pass such a decree with the *consent* of the guardian of the infant heir; (t) which delay and consent were in some particular cases dispensed with by special legislative enactments. (u)

After which it was, by a general law, declared, that in case an action at common law should be brought, in which the title to real estate was involved, which action should abate by the death of either plaintiff or defendant, and such title should descend or be devised to an infant, the action should not be tried during the minority of such infant, unless his guardian or next friend should satisfy the court, that it would be for his benefit to have it tried. (w) And it was further provided, that, in case there should not be personal estate sufficient to pay the debts of the deceased, the heir or devisee, being of full age, or upon his arrival at the age of twenty-one, should, to the value of the land descended, pursue the same rules, in payment of the debts of the deceased, as were prescribed by law for executors or administrators. (x) Thus, in effect, constituting the adult heir or devisee of the deceased an administrator of his real assets.

But still, as in actions at law by bond creditors against infant heirs or devisees, as original defendants, the parol must demur; and as creditors by simple contract, or where the heir of the debtor was not bound, could only sue in equity to obtain satisfaction from the real estate of their deceased debtor, where, as at law, the parol was allowed to demur in favour of infant heirs or devisees, to the great hindrance and delay of creditors, it was therefore, declared, that if any person should die without leaving personal estate sufficient to discharge his debts, and should leave real estate to descend, or which he had devised to a *minor*, the Chancellor might, upon the application of a creditor of the deceased, if he should deem it proper, after the *minor* had been summoned, and appeared by guardian, and the parties had been heard, and the justice of the claim had been fully established, order such real estate to be sold for the payment of the debts due by the deceased. (y)

(t) 1773, ch. 7; *Pue v. Dorsey*, 1 Bland, 139, note.—(u) 1784, ch. 82.—(w) 1785, ch. 80, s. 2.—(x) 1785, ch. 80, s. 7.—(y) 1785, ch. 72, s. 5; 1789, ch. 46; 1794, ch. 60, s. 2; 1799, ch. 79, s. 4; *Baltzell v. Foss*, 1 H. and G. 506.

But, although, according to all general principles, every part of the real estate of a debtor in the hands of his heir should be held applicable to the payment of his debts; yet it seems to have been unsettled, at common law, how far estates in remainder or reversion were to be considered as assets present or future. And formerly here, as in England, a notion prevailed, that such estates could not be sold in the first instance. (z) But in equity such

(z) *Charles v. Andrews*, 9 Mod. 151; *Bac. Abr. tit. Heir and Ancestor*, I; *Ram. on Assets*, 152, 163.

HINDMAN v. CLAYTON.—This was a creditor's bill, filed on the 18th of August, 1792, by James Hindman and others, against Richard E. Clayton and others, alleging that the late Solomon Clayton was indebted to the plaintiffs; that his personal estate was insufficient to pay his debts; and that his real estate descended to his children and heirs. Whereupon it was prayed that the real estate be sold, &c.

The infant defendants, answering by their guardian *ad litem*, admitted the insufficiency of the personal estate of their late father; and that he was indebted to the two plaintiffs, as they charged in their bill; (the amount claimed by one of them was, however, left blank in the bill and answer,) that their father did not die seized of the several tracts of land in the bill stated; but only of a fee in remainder, expectant upon an estate for life, &c.; that their grandmother Hannah Clayton is the tenant for life in the aforesaid lands, and is willing and agreed to join in the conveyance of the aforesaid part of a tract of land, called Neglect, for the benefit and advantage of these defendants; provided the creditors of their father Solomon Clayton will consent to wait for the balance of their claims until it can be raised out of the profits of the other lands above mentioned, which expectant estate these defendants humbly apprehend it would be greatly to their disadvantage to sell during the continuance of the particular estate.

31st January, 1794.—*HANSON, Chancellor*.—This case standing ready for decision, and being submitted on the bill, exhibits and answer, and the same, with all other proceedings, being, by the Chancellor, read and considered, and it appearing to him proper to exercise the discretion vested in him by law, in refusing the relief prayed by the bill, and that the proposal made by the defendants is fair and reasonable, and the Chancellor being satisfied of the insufficiency of the personal estate of their deceased father; and the claim of James Hindman, one of the complainants, being established to his satisfaction.

It is *Decreed*, that all the right, title and interest which hath descended from, or been devised by, the said Solomon Clayton, to the defendants in and to part of a tract of land in Queen Ann's County, called Neglect, be sold for the payment of his just debts; provided that Hannah Clayton, who appears, from the answer aforesaid, to be tenant for life thereof, shall first convey to the trustee hereafter by this decree appointed, and his heirs, all her right, title and interest therein and thereto, in trust to the intent that he shall sell the same agreeably to the directions hereof, and for the purposes herein mentioned, &c. (Peter Edmondson appointed trustee to make the sale, &c.) He shall then, provided the said Hannah Clayton shall make the said conveyance, and not otherwise, give notice by advertisement, inserted at least three weeks successively, in some convenient newspaper, and set up at convenient public places, of the time, place, manner and terms of sale; and, at the same time, and in the same manner, he shall give notice to the creditors of the said Solomon Clayton, to exhibit, within three months from the time of notice, their claims, and all the vouchers thereof, to the Chancellor.

estates, whether dependent on a term for years, an estate for life, or an estate tail, are deemed to be of some value ; and therefore,

The plaintiff James Hindman, by his petition, stated that Hannah Clayton, grandmother of the defendant, in whom was an estate for life in the lands which had descended from the said Solomon Clayton to the defendants, was then dead, &c.

29th March, 1794.—HANSON, *Chancellor*.—*Ordered*, that Peter Edmondson, the trustee, shall, in case the said Hannah Clayton be dead, proceed to the execution of the trust reposed in him, in the same manner as if the said Hannah had made to him the conveyance in the said decree mentioned ; and shall, in all respects, observe and follow the directions of the said decree. And it is further *Ordered*, that, in case the sale of the tract of land called Neglect, shall not produce a net sum sufficient to discharge the just claims exhibited, or to be exhibited to the Chancellor, the said trustee shall proceed to make sale of such part as may be necessary for that purpose of the residue of the real estate, of which the reversion or remainder descended from or hath been devised by the said Solomon to the defendants, or any of them ; and which, by the death of the said Hannah, the right of possession hath devolved on the said defendants, or any of them. And the trustee, in making such second sale, shall proceed in the manner prescribed for the tract of land called Neglect ; that is to say, the manner and terms of such second sale shall be the same as is prescribed for the first sale ; and the trustee shall proceed as prescribed in the said decree with respect to the notice, return, bringing money into court, and conveyance of the property sold, &c.

After which it was stated, that the death of Hannah Clayton had taken place since the date of this order.

10th May, 1794.—HANSON, *Chancellor*.—*Ordered*, that the trustee for the sale of the said Solomon's real estate shall proceed in the same manner as if the said Hannah had died before the date of the said order ; provided she be now dead.

The trustee made and reported a sale in the usual form, which sale was on the 10th of December, 1794, absolutely ratified. And Robert Walters having filed the voucher of his claim No. 7, he thereupon submitted it for a decision.

12th December, 1794.—HANSON, *Chancellor*.—Passed on a supposition, or rather a conclusion, that the executor and Orphans Court, are satisfied of the fairness and legality of the claim.

The vouchers of the claims of sundry creditors who had come in, having been submitted, with an application of the trustee for further directions.

8th January, 1795.—HANSON, *Chancellor*.—Claims against the estate of Solomon Clayton, deceased, established to the Chancellor's satisfaction. The dates added to the names, are the dates from which interest is to be calculated.

Samuel Earles' representatives, ... £91 16s. 5½d. May 1, 1791.

James Harris, ... 9 15s. 0d. Oct. 28, 1792.

John Watson, ... 2 2s. 9d. Nov. 5, 1792.

Robert Walters, as he has received £9 4s. 0d.

which is the interest for 2 years 51 days, that length of time is deducted from the time from which interest was originally chargeable, viz.

24th January, 1788, ... 71 15s. 5½d. March 15, 1790.

£175 9s. 8d.

ought to be sold immediately for the benefit of creditors, without waiting for the particular estate to fall in; and such is now the

Claims not established; the vouchers which the parties probably are possessed of not being produced.

Clement Sewell, (bond copy,)	£52	4s.	3½d.	Aug. 1, 1784.
Isaac Wikoff, do.	52	2s.	4d.	Aug. 1, 1799.
Esther Hindman, (supposed bond,)	25	18s.	4d.	Sept. 15, 1789.
Do. do. account, ...	18	5s.	11d.	Aug. 18, 1792.

£148 10s. 10½d.

Total of claims, as follows, ... £324 0s. 6½d. without interest.

James Hindman, as administrator, &c. has a bond for £112 11s. 6½d. endorsed with receipts for £2 17s. 3d. and £5 9s. 10½d.; and also by amount of taxes, the sum not mentioned. So that the amount of his claim cannot be precisely ascertained, although his claim was the foundation of the decree. William Hemsley, one of the complainants, says in the bill, that the deceased was indebted to him by bond, &c. leaving blanks for the sum. The answer admits this blank claim. If the solicitor has the bond, he never has produced it. The neglect of creditors to send their vouchers, or of their counsel to produce them, is a source of much trouble to the Chancellor. In the present case, it seems, the trustee has received money, and the Chancellor cannot direct the application, unless he gives a preference to those whose claims are ascertained; and if he does this, it is more than probable, that clamours will ensue. He must, however, do this, unless the creditors shall think proper to produce, within a short time, the proofs by which their claims are to be supported. It is the Chancellor only who is to decide; and, therefore, the original papers are to be lodged in the chancery office. There can, indeed, be no good reason wherefore a creditor, whose claim is allowed, and is to be satisfied, should retain the bond, note, or other thing on which his claim is founded.

By all decrees for sale, &c. the money arising from the sale, is directed to be brought into court. And this part of the decree is not only conformable to the provisions of the law, giving the Chancellor jurisdiction, but is meant for the security of those interested in the decree, in case they cannot settle the matter without bringing the money into court. This, however, is seldom done; and the receipts in writing, of the parties to whom the money is to be paid, when brought into court, are admitted instead of money; that is to say, when the claims are passed by the Chancellor, to be fully paid, or a dividend is struck by the Chancellor, the trustee may pay the money in the country, take receipts and lodge them in chancery instead of so much money.

In answer to the application of Mr. Edmondson, the trustee, this day received, the Chancellor can only say, that if a purchaser, under a decree of this court, for the sale of lands on credit, for the payment of debts, tenders the purchase money on the day of sale, and tenders the same immediately after the Chancellor's ratification of the sale he ought not to be charged with interest. The Chancellor cannot, with propriety, give any opinion or direction on any *ex parte* statement, relative to a particular case.

For the reasons already stated, the Chancellor cannot, at present, ascertain the sum to be raised by a further sale of Solomon Clayton's estate. He will proceed to pass an order on the 2d of March next, for the application of the money received or to be received, on the sale already made; and it is hoped, that before that day the creditors will produce their proof.

practice here as well as in England; (a) and in affirmance of such a course of proceeding, the like power has been given to the Court

After which, some of the creditors submitted their claims upon their vouchers for adjudication and allowance.

13th July, 1795.—HANSON, *Chancellor*.—Being satisfied of the justice of the claims of William Hemsley and Peregrine Tilghman, against the deceased, to the amount of £1,061 15s. 9d. including interest to this day, after deducting the payments; it is *Ordered*, that there be paid to the said claimants, out of the money arising from the sale of the real estate of the said deceased, the aforesaid sum of money, or that the said sum, or a part thereof, if assigned, be deducted from the purchase money due on the said sale, or credited to the purchaser.

After which the trustee stated, that it was highly probable, that the whole estate would be insufficient to satisfy the creditors of the deceased.

July, 1795.—HANSON, *Chancellor*.—The order of the 13th instant was passed, under the impression, that the estate of Clayton would be more than sufficient to discharge all his debts. It is now stated by the trustee, that it is uncertain, whether or not the part remaining to be sold will raise money enough to supply the deficiency of the first sale. The Chancellor, therefore, does not conceive it safe to discharge the whole claim, or even the whole of the net product of the first sale, the gross amount whereof is only £750, the sum of £540.

We the undersigned, creditors of Solomon Clayton, deceased, do hereby consent and agree, that Peter Edmondson, trustee, shall convey, in fee simple, unto Henrietta M. Clayton, widow of the said Solomon Clayton, the home plantation on which Mrs. Hannah Clayton lately dwelt, upon her, the said Henrietta, giving bond with surety to the said Peter Edmondson to pay him, to the use of the creditors, at the rate of three pounds per acre for the said plantation, upon the same terms the Honorable Chancellor of Maryland decreed the land of the said Solomon Clayton, called Neglect, to be sold. James Hindman, William Hemsley, Peregrine Tilghman, M. Earle, Cornelius Sewell, Esther Hindman.

15th August, 1795.—HANSON, *Chancellor*.—*Ordered*, That Peter Edmondson, trustee for the sale of the real estate of Solomon Clayton, deceased, be, and he is hereby, authorized to dispose of the home plantation on which Mrs. Hannah Clayton lately dwelt, at private sale, in the manner and upon the terms mentioned in a paper this day filed, and subscribed by sundry creditors of the said deceased; and that the said trustee having so made sale, report the same, &c.

The trustee, on the 20th of February, 1796, in the form of a letter addressed to the Chancellor, reported, that he had sold the home plantation to Henrietta M. Clayton for £3 per acre; that he had had the tract surveyed and found it to contain 189½ acres, and amounted to £567 7s. 6d.—which sale was on the 26th of April following, ratified and confirmed; after which, the case was submitted for further directions.

28th March, 1796.—HANSON, *Chancellor*.—*Ordered*, that the Chancellor, on the first Tuesday in June, will proceed to decide on each of the following claims against the estate of the said Clayton, viz: the claim of Cornelia Sewell, Esther Hindman, Henrietta Bracco, and James Earle; provided, respectively, that a copy of this order be served on the claimant at any time before the fifteenth day of May next.

of Chancery to sell such estates in remainder or reversion belonging to *minors* as estates in possession. (*b*)

Edward Harris, and Thomas Airey and wife, by their petition filed on the 16th of December, 1796, exhibited a claim against Solomon Clayton, deceased, as having died, seized of land which had descended, or been devised to him by his father, Edward Clayton. They alleged, that the said Edward Clayton, with three other persons, became security in a bond for Elizabeth Harris and George Garnet, executors of Thomas Harris, father of the said Edward Harris, and the wife of the said Thomas Airey; that there was due to them, from the said executors, a large sum for filial portions; that the executors not having discharged the said claim, a suit was instituted against the said Hannah on her bond, and judgment obtained by default; that she died, having fully administered, &c.; that then Michael Earle administered on the goods not, &c. of Edward Clayton, and died, having fully administered; that they had revived the judgment against him, and endeavoured to execute a writ of inquiry; that at length the damages were ascertained at September term, 1795, to £1,084 and costs; that as there is no personal estate of Edward Clayton, the lands in the hands of his grandchildren, which have come to them from him, are liable; that Solomon, their father, to whom the said lands from Edward had descended, had no personal estate; that they are entitled to be preferred to the proper creditors of the said Solomon; that they had not exhibited their claim before money had been paid to the said proper creditors; but as there is a balance in the trustee's hands of £682 8s. 6d., they claim it in virtue of that title to preference.

20th March, 1800.—HANSON, Chancellor.—The claims of these petitioners, when their petition was filed, were then laid before the Chancellor who found their proofs defective, and suggested what was necessary to bring the merits of the case fairly before him. The papers have since been laid before him several times, but he always has found them defective. He has this day examined every paper filed relative to the claim, and it appears to him that several papers which had been filed are now wanted, and it is not in his power to decide according to its merits. He regrets the great delay which has taken place in this cause. From the inattention of the claimants against Solomon Clayton, and the unwillingness of the Chancellor to let them suffer from that inattention, or ignorance, it had happened that the proceeds of the sales had not been fully applied before the said Harris and Airey exhibited their claim; and the Chancellor then doubted whether or not they were not too late, a great part of the said proceeds having been paid away to only a part of the claimants. On this head he is not yet satisfied.

He now thinks proper to make a list of the papers filed in support of the claim. [Here follows a description of the papers.]

It does not appear, from the proofs, that the land sold to Mrs. Clayton at £3 per acre ever belonged to Edward Clayton. If it did not, it is not answerable for Edward Clayton's debts, and neither the petitioner, nor Mr. Hemsley, have a right to be paid from the proceeds of the sale of any but part of *Neglect*, which is expressly devised to Solomon by Edward.

There is no proof relative to the circumstances of George Garnet, or the two other securities, William Clayton and Nathan Wright. When claims are exhibited against an infant's estate, and it appears that the debt was due from the deceased and another, or others jointly, it has been the Chancellor's uniform practice to allow only the just proportion to come out of the infant's estate. The practice is founded

Hence it appears, that by the operation of these last mentioned acts of assembly, and which, it is clear, from a consideration of

on this consideration : that on an application by creditors for the sale of an infant's estate, it is a matter of sound discretion, whether or not the Chancellor will decree a sale. He is governed by circumstances. In case of a debt due from the ancestor or devisors jointly with another who is solvent, the Chancellor might say, I will not decree a sale, or I will not suffer you to receive your debt from the infant's estate ; because you have it in your power, or had it in your power, since the ancestor's or devisor's death, to recover your whole claim from the other debtor. But the Chancellor conceived that to avoid circuity of action, and do justice to all, it was proper to charge the infant only his just proportion, or to admit the claim against the estate for only a just proportion. Were Garnet, William Clayton, and Nathan Wright all insolvent? Was one of them solvent, and the others not? Have any steps been taken to recover from them? It is certain, perhaps, that they are now protected by the act of limitations ; but is this a reason wherefore Edward Clayton's estate is to be charged with the whole?

It would have been more satisfactory to the Chancellor to have had the claim exhibited to him in the beginning, instead of the petitioners prosecuting a suit at law against the administrator *de bonis non*. He is not even clearly satisfied how the claim has been ascertained against that administrator.

The Chancellor is under the impression, that he long since suggested verbally the points in this case ; and the proofs which were necessary. He is under an impression, that besides other papers, which are now missing, was the argument in writing of counsel. However, he has now fully explained his ideas, and suggested his doubts and wishes to have all the proof which can be obtained, to hear the counsel, and to put an end to the case as speedily as possible. He has not yet had it in his power to decide on the true merits.

It is now proper to say something of the claim of William Hemsley and Peregrine Tilghman. Solomon Clayton having, as is proved to the Chancellor's satisfaction, passed a bond to them, in consideration of a debt due from Edward Clayton, they did not thereby lose their lien on Edward Clayton's land, but gained an additional security, and all Solomon's lands are liable. As to the land coming from Edward Clayton, they are to be preferred to all the creditors, except the present petitioners. As to Solomon's land, if any there be, which did not come from Edward, they are on a footing with other creditors. The petitioners, having a claim against Edward's estate only, can have no title to be paid out of that part of Solomon's land, if any there be, which did not come from Edward.

The case was again brought before the Chancellor by the trustee for further directions, and praying that his trust and the whole proceedings might be brought to a close.

8th March, 1805.—HANSON, Chancellor.—No cause has ever been before the Chancellor in which he has had so much trouble in examining the proceedings, and making statements and orders, and instructions in writing, in order that the merits of the several claims might be brought fairly before him. He has suffered great uneasiness on account of that delay which has taken place, which may appear to be unaccountable, but which has been owing to the negligence, inattention, or ignorance, or all combined of the parties themselves. In the beginning all the claims exhibited were merely against Solomon Clayton, as if the debts were originally due from him. Had that been the case the proceeds of the sale would have been properly divided amongst the claimants in due proportion, and a considerable part of

the then existing law, could have had, and were always understood to have had no other object, that the privilege formerly

each claim would have been discharged. As matters then stood, the Chancellor directed several payments to be made out of the money in the hands of the trustee. But, before the dividend was actually struck, a claim was exhibited on the part of Dr. Harris and Mrs. Airey for money due from the estate of Edward, the father of Solomon Clayton, from whom the land came to the said Solomon. Of this claim the Chancellor had never been apprised. They claimed a preference to the proper creditors of Solomon Clayton. But, inasmuch as money had been paid away, before they came into court, they professed themselves, by counsel, willing to take only the money remaining in the hands of the trustee.

After this Messrs. Hemsley and Tilghman required also a preference, on account of their claim having been founded on a debt originally due from Edward, the father. It appeared likewise, that the debt to James Anderson, was originally due from the said Edward. By far the greater part of the delay in the case has arisen on the part of Dr. Harris, whose petition was not accompanied with the necessary vouchers to establish all the points, on which his claim against the estate and the title to preference were supposed to be founded. In the course of several years, his papers have several times been laid before the Chancellor and as often found defective ; although the Chancellor had stated his ideas, and even given full directions in writing.

The Chancellor must here refer to a statement and remarks made in writing on the 20th day of March, 1800 ; in which he states the practice and principles of this court, relative to joint debts, due from a person deceased, whose land, in the hands of infant heirs or devisees, is sold under a decree of this court. And he conceives, that agreeably to those principles, Dr. Harris and Mrs. Airey ought not to be allowed more than one-third of their claim, supposing even that there were enough to pay all the creditors of Edward, the father of Solomon, the son.

The trustee now comes, and applies to the Chancellor, anxious to discharge himself of the money, and to complete his trust ; and under all circumstances the Chancellor thinks proper to have the business closed with as little further delay as consistently may be.

It is *Ordered*, that the auditor state an account dividing in due proportion to the amount of their claims, amongst Edward Harris and his sister Mary Airey, and Messrs. Hemsley and Tilghman the money arising from the sale, after deducting the costs of suit, and the trustee's commission of £ 112 10s. in which is included near £ 30, for surveying, advertising, &c. and the expense of several necessary journeys or voyages ; and deducting too £ 45 paid to Ringgold in part of his claim. Dr. Harris and sister to be allowed for one-third of their claim. Hemsley and Tilghman, for their whole claim. Hindman to be allowed only for his claim as representative of James Anderson.

N. B. Inasmuch as it was plainly the fault of the said claimants in not shewing their title to preference, that £ 45, which was less than one-half of his claim, was paid to Ringgold, the Chancellor conceives it just, that the loss of the said sum should be proportionably borne amongst them. Had it not been for the preferences, it is certain, that each claimant would have drawn one-half of his claim ; and as dividends would have been struck before the payment to Ringgold, had not vouchers been wanting in some cases, and the precise amount of some claims uncertain. The Chancellor thought it improper to let the money lie useless ; as would have been the case, if the claim of Harris and Airey had not been exhibited soon after the preference claimed. It was indeed fortunate that a proportionable sum was not

granted to infants, of allowing the parol to demur until they attained their full age, has been totally abolished as regards creditors' suits in equity; (c) since the Chancellor has been thereby directed, on the indebtedness of the deceased ancestor or devisor being established, and the insufficiency of his personalty being made to appear, to cause his real estate to be sold and conveyed by a trustee to the purchaser; (d) notwithstanding the minority of the heirs or devisees. (e) And consequently, the pretext, that of allowing the parol to demur, for depriving the creditors of the rents and profits of their deceased debtor's real estate in favour of his infant heirs or devisees, having been thus abrogated, an account of such rents and profits may now be called for from the *infant* as well as from the *adult* heirs and devisees of a deceased debtor; (f) upon the same ground, that his executor or administrator may be made to account for the increase and profits of his personal estate. (g) So that in all cases, where it appears that the realty must be responsible, a receiver may be put upon it, where necessary, for the purpose of taking care of its rents and profits for the benefit of the creditors. (h)

To enable a creditor to sue on behalf of himself and all others who stand in the same relation with him to the subject of the suit, it must appear, that the relief sought by him is, in its nature, beneficial to all those whom he undertakes to represent; (i) and that

paid to each proper creditor of Solomon Clayton. Whether or not, the money can be recovered from Ringgold, the Chancellor will not give his opinion.

In obedience to this order, the auditor made and reported a statement distributing the proceeds accordingly; upon which the case was again brought before the court.

14th March, 1805.—HANSON, *Chancellor*.—Ordered, that the money arising from the sale; great part whereof hath been long in the trustee's hands ready to be paid, be, and it is hereby directed to be applied according to the above statement; and that the receipts in writing of any person entitled to receive the said money, be admitted here in the place of so much money; and that, under the circumstances of the case, the trustee Peter Edmonson, be not answerable for any interest which he had not received from a purchaser. Provided nevertheless, that he without reasonable delay either deposite the said principal money in court, or receipts in writing as aforesaid for money already paid, or to be paid agreeably to the foregoing statement.

(c) *Boucher v. Bradford*, ante 222.—(d) 1785, ch. 72, s. 7.—(e) *Powys v. Mansfield*, 9 Cond. Cha. Rep. 445.—(f) Co. Litt. 113, a. 236, a; *Lancaster v. Thornton*, 2 Burr. 1031; *Yates v. Compton*, 2 P. Will. 311; *Bedford v. Leigh*, 2 Dick. 709; *Silk v. Prime*, 1 Bro. C. C. 140, note; *Curtis v. Curtis*, 2 Bro. C. C. 633; 1793, ch. 101, sub. ch. 12, s. 9.—(g) Will. Exrs. 1012.—(h) *Sweet v. Partridge*, 2 Dick. 696; *Jones v. Pugh*, 8 Ves. 71.—(i) *Good v. Blewitt*, 13 Ves. 397; *S. C.* 19 Ves. 336; *Burney v. Morgan*, 1 Cond. Ch. Rep. 185; *Gray v. Chaplin*, 1 Cond. Cha. Rep. 451; *Spittal v. Smith*, 5 Cond. Cha. Rep. 275.

the object of the bill is not merely to establish any existing priorities among them as creditors. (*j*) A mortgagee or a vendor holding an equitable lien, claiming merely as such, has no common interest with the creditors at large; and therefore, cannot be allowed to represent them by suing on their behalf, and having them called in to participate in a suit, the sole object of which is to obtain the benefit of such a lien, by which the whole subject in controversy is claimed, and may be entirely borne away. (*k*) As where the plaintiff alleged, that he was the vendor of a tract of land, for which a part of the purchase money was still due, which land had descended to the defendants as heirs of the vendee; and that the personal estate of the deceased purchaser was insufficient to pay his debts. The truth of all which was admitted; and the administrator by his answer prayed, that the balance of the proceeds of sale, after paying the plaintiffs, might be put into his hands to be applied to the payment of the debts of the deceased. But this prayer of the administrator was rejected; upon the ground, that no sufficient foundation had been laid to authorize the court to treat the case as a creditor's suit, and to assume the administration of the assets of the deceased for the general benefit of his creditors. (*l*)

But, in so far as a mortgagee or the holder of a vendor's lien has a claim beyond the extent of such lien; because of the deficiency of the premises to pay the debt; or because of some other claim, in addition to such debt, which there is not a sufficiency of personal estate to satisfy, he may, in respect of such claim, sustain a creditor's suit by thus blending two distinct causes of suit, in only one of which the other creditors have a common interest. As where a vendor, in addition to a balance of the purchase money, set forth a large claim as due to him on another account, to pay which he alleged, that the personal estate of the deceased was insufficient; the case was treated as a creditor's suit; because, as regarded such additional claim the plaintiff had an interest in common with the other creditors who he undertook to represent; and for whose general benefit it was necessary that the court

(*j*) *Newton v. Egmont*, 6 Cond. Cha. Rep. 265; *Calvert on Parties*, 220.—(*k*) *Sumner v. Kelly*, 2 Scho. and Lefr. 398; *Burney v. Morgan*, 1 Cond. Cha. Rep. 185; *Gray v. Chaplin*, 1 Cond. Cha. Rep. 454; *David v. Grahame*, 2 H. & G. 94.—(*l*) *Ellicott v. Welch*, ante 242.

should assume the administration of all the assets of the deceased debtor. (*m*)

And there are likewise instances in which a creditor's suit may be engrafted upon another suit; which, in its origin and object, had no relation whatever to a case of debtor and creditor; or in which the only object was to enforce a lien, such as a mortgage or vendor's lien, for the payment of a single debt. As where a mortgagee had filed a bill against the heirs of a mortgagor to obtain a sale of the mortgaged realty for the payment of his debt; or where a bill had been filed to obtain a partition of an intestate debtor's real estate; or where the real estate of a deceased debtor had been, or was about to be sold under the special provisions of an act of assembly; (*n*) or where in any such case, a share of the proceeds of sale was about to be awarded and paid to parties as heirs or devisees of a deceased debtor, (*o*) any creditor of the deceased may come in, by petition, for himself and on behalf of the other creditors, without calling in his executor or administrator as an additional party to such pending suit, and have the surplus, or the whole proceeds of sale; or the share to which the deceased debtor may be entitled; and which then remains subject to the control of the court, applied in satisfaction of his debts; upon which all the proceedings are taken together as forming one creditor's suit, as to the whole, or the particular share, and are so treated accordingly through all its subsequent stages. (*p*) The object of the secondary proceeding, in such instances, being to intercept the assets, and prevent their misapplication is, in effect, a prayer for relief against the proceedings in the original suit; and is a kind of engraftment of a scion of a different species upon a then growing stock. (*q*)

(*m*) *Bedford v. Leigh*, 2 Dick. 707; *Charles v. Andrews*, 9 Mod. 153; *Shephard v. Lutwidge*, 8 Ves. 29, note; *Jarrett v. Rider*, 9th July, 1829.

WASHINGTON COLLEGE v. GRAVES.—It was alleged, that the mortgaged real estate was insufficient to pay the mortgage debt; and that the whole estate, real and personal, of the deceased mortgagor, was insufficient to pay his debts. Whereupon it was prayed, that the whole, including his unincumbered real estate, might be sold to satisfy the mortgage and other creditors. The facts being admitted, the case was considered and treated as a creditor's suit; and on the 26th of June, 1830, *Decreed* accordingly, that the real estate in the proceedings mentioned be sold, &c.; and that notice be given to the creditors of the deceased to file the vouchers of their claims, &c. M. S.

(*n*) 1785, ch. 72, s. 12; 1816, ch. 154; 1818, ch. 133; 1831, ch. 311.—(*o*) *Lewis v. Lewis*, 27th April, 1829, M. S.—(*p*) *Fenwick v. Laughlin*, 1 Bland, 474; *Gaither v. Welch*, 3 G. & J. 264.—(*q*) *Park. His. Co. Cha.* 506.

As to who may or must be made parties to a creditor's suit, the general rule is, that all persons having an interest in the object of the suit, ought to be made parties. But as this rule results from a consideration of the advantage which all persons must have in the entire settlement of the matter in litigation, it is founded on convenience; and is therefore made to yield in cases of necessity, or where it would be attended with any inconvenience which may be safely avoided; upon the ground of their being a common interest among creditors, which any one of them may sufficiently represent; and to avoid the great inconvenience of making all of them parties, any one has been allowed to file a bill for himself, and in behalf of all others of his co-creditors. But, as regards the defendants to a creditor's suit, the general rule would lead, in administering the assets of a deceased person, to taking notice of his credits, and following his estate beyond his personal representatives; and, consequently, to the bringing forward of his debtors; yet the practice of the court has prescribed bounds to the inquiry; and accordingly the rule is to stop short at the personal representatives of the deceased, unless the justice due to the plaintiffs, or the peculiar circumstances of the case, should require others to be called in. (*r*)

The personal estate being the primary and natural fund for the payment of debts, must be first resorted to, even for the satisfaction of debts due to the state, as well as to individuals, so far as it remains and can be found. (*s*) And if that estate be insufficient, there can, with propriety, be no other person than the executor or administrator of the deceased, made defendant to a creditor's suit. But if the bill alleges, or it can be shewn, that the deceased debtor left no personal estate, or that it had been exhausted or wasted, or by any means become insufficient for the payment of the debts of the deceased; and that he left real estate, then all the heirs and

(*r*) *Holland v. Prior*, 7 Cond. Cha. Rep. 22.—(*s*) *Magna Charta*, c. 18; *Kilty's Rep.* 205; 2 Inst. 18 and 32; *Evelyn v. Evelyn*, 2 P. Will. 664, note; *Mogg v. Hodges*, 2 Ves. 52; *Bootle v. Blundell*, 19 Ves. 518; S. C. 1 Meriv. 220; *The King v. Hopper*, 1 Exche. Rep. 280; *Brogden v. Walker*, 2 H. & J. 294. Although by the law of some other countries, the lands as well as every other kind of property of the debtor are, as at this time in Maryland, alike liable for the payment of his debts, whether due by simple contract or otherwise; yet every where the personal or moveable estate of the debtor seems to have been considered as the primary fund, which was to be first applied in payment of debts, so far as it would go, in aid of the land or real estate of the debtor; *Bowaman v. Reeve*, Prec. Cha. 577; *Anonymous*, 9 Mod. 66; *Vattel*, b. 1, c. 7; *Code Napol.* by *Barret*, Introd. 328; 7 *Petersdorff*, Abr. 527, note.

devisees must be made parties to enable the creditors to obtain satisfaction out of such real assets. (*t*) Owing, however, to our law of partible inheritances, much inconvenience arises, in some cases, from the rule, that all the heirs and devisees must be made parties; which the legislature has endeavoured to remove, by requiring the heir, at common law only, to be summoned; and allowing an order of publication against the rest. (*u*) But although it is, in general, necessary to have the executor or administrator before the court; either as a plaintiff, asking direction and indemnity, or as a suing creditor; (*w*) or as a defendant, to have an account of the personal estate, that it may be first applied as far as it will go; yet if the debtor left no personal estate whatever, and that fact plainly appears in the case; or the personal estate left by him, was of so little value, that no one had taken out letters of administration; (*x*) which fact of there having been no letters of administration may be sufficiently shewn by a certificate of the register of wills of the county in which the debtor died; (*y*) or if the executor of the deceased debtor be dead and insolvent, a creditor's suit may be sustained against the heirs and devisees of the deceased debtor alone, without making his personal representatives defendants. (*z*)

If the deceased debtor at the time of his death, was a partner with others, then, upon the allegation of that fact; and because of his assets having been so, during his life-time, mixed up with the property of others, his surviving partners, upon whom the whole had devolved, must be also made parties, in order, that the plaintiffs may have an account of the personal estate entire; and so obtain, from the surviving partners, that which properly forms a part of the assets of the deceased. (*a*) Where the bill charges, that by collusion between the executor or administrator of the deceased, and some third person the assets have been misapplied or wasted, such third person will be held liable; and, therefore, should be

(*t*) *Knight v. Knight*, 3 P. Will. 331; *Kenyon v. Worthington*, 2 Dick. 668; *Galton v. Hancock*, 2 Atk. 435; *Ashurst v. Eyre*, 3 Atk. 341; *Madox v. Jackson*, 3 Atk. 406; *Fordham v. Rolfe*, 5 Cond. Cha. Rep. 257; *Tyler v. Bowie*, 4 H. & J. 333; *David v. Grahame*, 2 H. & G. 97.—(*u*) 1797, ch. 114; 1831, ch. 311, s. 10 and 11; *Kilty v. Brown*. ante 222.—(*w*) *Wankford v. Wankford*, 1 Salk. 304.—(*x*) *Walley v. Walley*, 1 Vern. 487; *Cowslad v. Cely*, Prec. Cha. 83; *D. Aranda v. Whittingham Mosely*, 85; *Heath v. Percival*, 1 P. Will. 684; *Ashurst v. Eyre*, 2 Atk. 51; *Madox v. Jackson*, 3 Atk. 406; Will. Exrs. 227.—(*y*) *Deshon v. Buchanan*, 1 February, 1819.—(*z*) *Gregory v. Forrester*, 1 McCord. 326; *Riddle v. Mandeville*, 5 Cran. 330.—(*a*) *Bowsher v. Watkins*, 4 Cond. Cha. Rep. 424; *Holland v. Prior*, 7 Cond. Cha. Rep. 22.

made a party, in order to obtain a decree against him; (b) so too, where the executor is insolvent and has not the means to sue, or will not act, a creditor's suit may be brought against him and other persons accountable to the estate. (c) And where, after the death of a debtor, his personal estate had passed into the hands of his executor or administrator, who died without accounting for such assets, the executor or administrator of the deceased executor or administrator becoming thereby, as it were, a representative of the first deceased debtor, in respect of the assets which had thus come to the hands of his testator or intestate; and being so liable to that extent, should be charged and made a party accordingly, together with the surviving executor, or the administrator *de bonis non* of the first deceased; not, however, upon the ground, that an executor of an executor is entitled, here as in England, to administration *de bonis non* of the first deceased; (d) but because of there being, in respect of such assets, a privity and a mediate representation of, and indebtedness to the first deceased. (e)

In a creditor's bill against the representatives of a deceased debtor, it was formerly not unusual to describe particularly the real estate of which the deceased debtor died seized; but as it may, in most cases, be impracticable for a creditor to do so, it has been held to be unnecessary to set forth any description of the deceased's real estate. (f) But it is usual, and in most cases necessary, in such bills, to set out with a *qui tam* allegation, that "your orator, A. B., of — county, as well on behalf of himself, as of other the creditors of C. D., late of — county, deceased, who shall come in and contribute to the expense of this suit, that the said C. D. being, in his life, and at the time of his death, seized in fee simple of a considerable real estate," &c. (g) Whence it would seem, that the other creditors should always be called in to participate as *co-plaintiffs*; but when they do come in, they are thenceforward considered as parties to the suit; (h) and may be regarded as taking the position of either plaintiffs or defendants as their in-

(b) *Elmslie v. M'Auley*, 3 Bro. C. C. 624; *Doran v. Simpson*, 4 Ves. 651; *Alsager v. Rowley*, 6 Ves. 749; *Benfield v. Solomons*, 9 Ves. 86.—(c) *Burroughs v. Elton*, 11 Ves. 29.—(d) 1798, ch. 101, sub ch. 5, s. 6.—(e) 1816, ch. 203, s. 3; *Williams v. Williams*, 9 Mod. 299; *Holland v. Prior*, 7 Cond. Cha. Rep. 22.—(f) *McMechen v. Chase*, 19th July, 1815, per Kilty, Chancellor, on demurrer for that cause.—(g) 2 Harr. Pra. Cha. 322; *Willis, Plea. Eq.* 220.—(h) *Neve v. Weston*, 3 Atk. 557; *Hardcastle v. Chettle*, 4 Bro. 163; *Good v. Blewitt*, 19 Ves. 338.

terests or the nature of the case may require. (*i*) And as it must appear, in all cases, where a creditor undertakes, by a creditor's suit, to represent the interests of others, that the relief sought is, in its nature, beneficial to those others, it follows, that where a creditor may sue either for his own claim alone, or as well in behalf of others as of himself, that he should, by an express averment in his bill, make his election to sue in the one way or the other; (*j*) and where he has sued merely in his own name, but can only obtain the relief he seeks by suing as well in behalf of the other creditors as himself, his bill must be amended to that effect before or at the hearing. (*k*) But, in general, it is the nature of the case which gives to it the character of a creditor's suit; for an allegation in the bill, that the plaintiff sues as well for himself as other creditors, will not alone justify its being treated as a creditor's suit where the case does not warrant it; nor will the omission of such an allegation prevent its being so considered, where the nature of the case is such as to require the creditors to be called in. (*l*)

The establishment of the whole, or a part, of the claims of all, or of some one or more of the originally suing creditors, is the first point to be determined. In all cases, it is indispensably necessary that the plaintiff should sustain the facts of his case, either by proof, or by the admission of his opponents; for, otherwise he can have no standing in court, nor any right to sue, whatever may be the law arising out of such facts. If, therefore, the claim of the plaintiff be denied by all, or any one of the defendants, it must be proved. (*m*)

A guardian *ad litem* of an infant defendant, being appointed by the court for the purpose of having the proceedings substantiated against him, so that justice may be done to the plaintiff, (*n*) like a solicitor, becomes thereby so far one of the guardians of the *lis*, that he is bound to have it conducted with as much fairness and benefit to the infant as the nature of things will permit. (*o*) It is

(*i*) *Finch v. Winchelsea*, 1 P. Will. 281; *Leigh v. Thomas*, 2 Ves. 313; *Mc-Mechen v. Chase*, 1 Bland, 85, note; *Williamson v. Wilson*, 1 Bland, 433.—(*j*) *Baldwin v. Lawrence*, 1 Cond. Cha. Rep. 331.—(*k*) *Good v. Blewitt*, 13 Ves. 397; *Johnson v. Compton*, 6 Cond. Cha. Rep. 20.—(*l*) *Shepherd v. Kent*, Prec. Cha. 190; *S. C.* 2 Vern. 435; *Martin v. Martin*, 1 Ves. 214; *Anonymous*, 3 Atk. 572; *Strike's case*, 1 Bland, 84; *Williamson v. Wilson*, 1 Bland, 430.—(*m*) *Lingan v. Henderson*, 1 Bland, 236; *Tyson v. Hollingsworth*, ante 327, note; *Hindman v. Clayton*, ante 337, note.—(*n*) *Beauraine v. Beauraine*, 4 Eccle. Rep. 456; *Boraine's case*, 16 Ves. 346.—(*o*) *Co. Litt.* 88, note 70, and 135; *Taylor v. Atwood*, 2 P. Will. 643, note 1; *Snowden v. Snowden*, 1 Bland, 552.

his duty to use all proper diligence in answering for the infant; (*p*) and in seeing that the proofs are correctly taken and brought in; (*q*) and he will be held liable if guilty of any fraud, misconduct, or negligence; (*r*) generally speaking, the infant will be bound by the consent of such a guardian, as well as by that of his solicitor in relation to the regular conduct of the suit. (*s*) But where, after evidence had been taken under an original bill, an amended bill was filed, making infants parties, their guardian *ad litem* was not allowed to consent to the reading of such evidence against them; (*t*) nor has such a guardian any power to execute a release for the purpose of giving competency to a witness; (*u*) nor is he allowed, merely as such, to receive any money which, in that suit, may be awarded to the infant; (*w*) or, in any way to bind the interests of the infant by a consent, operating as a contract, in relation to matters intended to sustain the claim of the plaintiff; or to supply a defect in the merits of the plaintiff's case, which do not constitute a part of the regular proceedings in the suit. Yet, if there be no apparent and just ground of defence, such a guardian may consent to a decree against the infant. (*x*) An infant defendant, however, who always answers by his guardian *ad litem*, who alone swears to the answer, cannot be bound by any admission in his answer so made; it amounts to nothing; it cannot be read against him; and for that reason, where he admitted the claim by such an answer, it was, nevertheless, deemed necessary to read the proofs to see that the plaintiff had made out his case; and even where such proof might readily be produced, the parol was allowed to demur until the infant attained his full age. (*y*)

(*p*) Snowden v. Snowden, 1 Bland, 553.—(*q*) Quantock v. Bullen, 5 Mad. 81.—(*r*) Richmond v. Taylour, 1 Dick. 38; Pearce v. Pearce, 9 Ves. 548; Ward v. Ward, 3 Meriv. 706; Russell v. Sharpe, 1 Jac. and Wal. 462; Gilb. His. Com. Pleas, 54.—(*s*) Tillotson v. Hargrave, 3 Mad. 494; Scarth v. Cotton, Ca. Tem. Tal. 198.—(*t*) Quantock v. Bullen, 5 Mad. 81.—(*u*) James v. Hatfield, 1 Stra. 548; Fraser v. Marsh, 3 Com. Law Rep. 235.—(*w*) Corrie v. Clarke, 1 Bland, 86, note.—(*x*) Richmond v. Taylour, 1 Dick. 38; Wall v. Bushby, 1 Bro. C. C. 488.—(*y*) Leving v. Claverly, Prec. Cha. 229; Guernsey v. Rodbridges, Gilb. Rep. 4; Fountaine v. Caine, 1 P. Will. 504; Wrottesley v. Bendish, 3 P. Will. 236; Chaplin v. Chaplin, 3 P. Will. 367; Eggleston v. Speke, 3 Mod. 259; S. C. Carth. 79; Legard v. Sheffield, 2 Atk. 377; Strudwick v. Pargiter, Bunb. 338; Lucas v. Lucas, 13 Ves. 274; Lechmere v. Brasier, 2 Jac. and Wal. 290; Lock v. Foote, 6 Cond. Cha. Rep. 67; Kelsall v. Kelsall, 8 Cond. Cha. Rep. 58; Beasley v. Magrath, 2 Scho. and Lefr. 34; Savage v. Carroll, 1 Bal. and Bea. 553; 1 Fowl. Exch. Pra. 415; Bac. Abr. tit. Infancy and Age, L. 1.

These principles of law and equity operated very prejudicially against creditors who had no other means of obtaining satisfaction of their claim than from the real estate of their deceased debtor in the hands of his infant heir or devisee; and therefore, it was, by an act of assembly, declared, that a decree for a sale of the real estate for the satisfaction of any claim against it might be obtained by *the consent of the guardian* of the infant heir or devisee. (z) Thus, in effect, giving to the answer of an infant, by his guardian, in all creditors' suits, and suits by mortgagees, the force and operation of an adult defendant in so far as to authorize the immediate sale of the realty without allowing the parol to demur. (a) By a subsequent legislative enactment it was declared, that if any person should die without leaving personal estate sufficient to discharge the debts by him due, and should leave real estate, the Chancellor, after summoning the minor heir or devisee, and his appearance by guardian to be appointed for that purpose, and to answer and defend for him; and on the justice of the claim of the creditor being fully established, might order the real estate to be sold for the payment of the debts due by the deceased. (b) Thus virtually abolishing the infant's privilege of having the parol to demur, and of shewing cause when he attained his full age; and so placing it in the power of the Court of Chancery, at once, to compel him to do justice to the creditors of his ancestor or devisor, by divesting him of the privilege of alleging his minority as a means of obstructing, for a time, the regular course of justice.

It having been thus put upon infant defendants, in such cases, to defend their interests immediately, and as effectually as they can, by a mere guardian *ad litem*, who has been expressly authorized to consent to an immediate sale of the real estate; the answer of an infant by his guardian, in all such cases, must be taken to be as conclusive against him as if he had answered as an adult. (c) And as a creditor, who comes in under a decree, may have his claim allowed upon affidavit, if it be not expressly denied and contested; so a creditor, suing as an original plaintiff, may obtain a decree on a similar authentication of his claim, unless it be expressly denied and put in issue by the answer of an adult or infant defendant; otherwise a plaintiff creditor would be made to encounter greater difficulties than one who came in under the de-

(z) 1773, ch. 7.—(a) *Prutzman v. Pitesell*, 3 H. and J. 80; *Pue v. Dorsey*, 1 Bland, 139, note.—(b) 1785, ch. 72, s. 5; *Birch v. Glover*, 4 Mad. 376.—(c) *Kent v. Tancyhill*, 6 G. and J. 3.

cree. (d) Such has always been held to be the true construction and necessary consequence of those legislative enactments ; for, if it were not so, they would have removed no obstructions, nor given to creditors any additional facilities whatever in recovering satisfaction of their debts from the real estate of their deceased debtor, in the hands of his *infant* heirs or devisees. (e)

(d) *Hill v. Binney*, 6 Ves. 738 ; *Burroughs v. Elton*, 11 Ves. 36.

(e) But, in regard to this privilege of infants, it may be well to recollect, that, in some cases, it still exists ; and that the parol may demur in all cases at common law and in equity, except where it has been otherwise provided by the above-mentioned acts of assembly ; by those acts in relation to proceeding by publication, against absent *infant* defendants, and by the act which relates to infants who may be made parties to a suit which had abated by death. In Virginia, it has been declared that the parol shall not demur in any suit at law or in equity, by reason of the infancy of the plaintiffs or defendants, or either of them—1798, ch. 240. In England, the giving of a day to shew cause after they come of age, and allowing the parol to demur, has, by a statute passed in the year 1830, been totally abolished. 1 W. 4, c. 47, s. 10 ; *Kelsall v. Kelsall*, 8 Cond. Cha. Rep. 61 ; *Powys v. Mansfield*, 9 Cond. Cha. Rep. 446. By the civil law, the estate of a minor might be sold by his guardian for the payment of any debts due by the ancestor or person from whom it was derived ; or for any necessary purpose under the sanction of a decree of a court ; yet it is said, that according to that law, if there be a suit or controversy on foot touching the estate of the minor, it should, in his favour, be postponed until the time of his puberty. *Ayliffe Civ. Law*. 218, 219 ; *Bac. Abr. tit. Infancy and Age*, L. 1.

BOND v. BOND.—This creditor's petition, filed on the 21st of October, 1783, stated, that the petitioners were creditors of the late Joshua Bond, who died intestate, seized of a considerable real estate, leaving a widow and several children, among others, John Bond, the only defendant, a minor, his eldest son and heir at law ; that the intestate, at the time of his death, was indebted to the petitioners and divers persons in considerable sums of money, far exceeding the amount of his personal estate, which Ann, his widow, as administratrix, has paid away in discharge of his just debts. Prayer that the lands be sold, &c. The infant defendant and heir answered by his guardian *ad litem*, &c.

2d June, 1786.—*ROGERS, Chancellor*.—This case standing ready for decision, and the petition, answer, and other proceedings, appearing as before recited and set forth, it is thereupon *Decreed*, with the assent of the said John Dodd as guardian of the said John Bond, that the said John Dodd who is hereby appointed trustee for that purpose, and the other purposes of this decree do set up and expose to sale at public vendue, upon twelve months credit, the several tracts and parcels of land in the petition mentioned, or such part or parts thereof as may be sufficient to pay and satisfy the petitioners their respective claims ; that is to say, all that tract of land called Good Luck, lying in Baltimore county, and containing one hundred and twenty-five acres, more or less ; all that tract of land called Addition to Good Luck, lying in Baltimore county, and containing twenty-five acres, more or less ; and also all that other tract of land, lying in Baltimore county, called Round About Neighbours, and containing sixty-one acres, more or less ; after giving six weeks notice thereof, in the Baltimore newspapers, of the time and place of such sale ; and the same several tracts of land when so sold ; or so much thereof so disposed of as may be necessary for the purposes aforesaid, the said John Bond, by his guardian afore-

The next point to be established in a creditor's suit against the representatives of a deceased debtor to enable his creditors to ob-

said, do, and shall, effectually convey and assure to the purchaser or purchasers thereof, their heirs and assigns in fee, upon the payment of the purchase money thereof to the said John Dodd, as guardian aforesaid. And it is further *Decreed*, that the said trustee do, and shall, as soon as the sales are made, and upon his receipt of the purchase money, pay and satisfy, according to the due course of administration, to the petitioners, the several sums of money due them, and each of them, on their several claims exhibited to this court, with the petition aforesaid; and also the legal interest due, and which may become due, on the several bonds or obligations in the petition mentioned. And it is further *Decreed*, that the said trustee do, and shall, as soon as the several parcels of land aforesaid, or so much thereof as may be necessary for the purposes aforesaid, are sold, for the confirmation of such sales, before any conveyance thereof, make and lodge in this court under his hand, and with his affidavit of the truth thereof thereto annexed, a just and accurate certificate or memorandum of the said sales, to whom made, and when, and at what price, and upon what terms the same were disposed of; and also, as soon as may be, after his receipt of the purchase money thereof, render to this court a full, just, and true account, with his affidavit annexed, of his disbursements thereof, to whom made, and at what time or times. And it is further *Decreed*, that the said trustee do, and shall, before any sale or disposition is made of the premises aforesaid, or any part thereof, in pursuance of this decree, execute and file in this court his bond to the state, &c. faithfully to fulfil and perform the trust in him reposed by the decree, &c. — *Chancery Proceedings*, No. 2, fol. 608.

MILDRED v. NEILL.—This was a creditor's petition, filed on the 25th of April, 1787, by Daniel Mildred and sundry others, against Isabella Neill, widow, Elizabeth Neill, Mary Neill, Alexander Neill, Callender Neill, and Isabella Neill, the younger infants, Hercules Courtney, Thomas Neill, and Joseph Donaldson. The petition states, that the plaintiffs were the creditors of William Neill, deceased, who departed this life some time in the year 1785, indebted to the plaintiffs, and sundry others, in divers large sums of money; that he devised his estate to his widow and five children, the defendants, some of whom are in a state of minority, and incapable of disposing of the real estate devised to them by their father for the payment of the plaintiffs' claims; that the testator appointed the defendants, Isabella Neill, the widow, Hercules Courtney, Thomas Neill, and Joseph Donaldson, his executors, who took upon themselves the trust; that the personal estate had been fully administered, and that there were not personal assets to satisfy the plaintiffs' claims. Whereupon it was prayed, that the executors might account for the personalty; and that the devisees might disclose of what the real estate of the deceased consisted; and also be compelled to sell the real estate for the payment of the claims of the plaintiffs and others, according to law.

Isabella, the widow, by her answer admitted the indebtedness of the deceased and his will; but alleged, that she had sued out a writ of dower, and had obtained judgment thereon to recover her dower. The other adult defendants and the infant defendants by their guardian *ad litem*, admitted the debts of the plaintiffs; and specified the real estate of which the testator died seized. The will of the testator, and the accounts of the executors settled with the Orphans Court, were exhibited as parcels of the pleadings.

26th February, 1788.—ROGERS, Chancellor.—This case standing ready for decision, and the bill, answers and other proceedings appearing as before set forth, it is

tain satisfaction by a sale of his real estate, is the insufficiency of his personal estate to pay his debts. If that fact be denied, an ac-

thereupon *Decreed*, with the assent of the said Hercules Courtney, as guardian of the said Elizabeth Neill, Mary Neill, Alexander Neill, Callender Neill, and Isabella Neill, that he the said Hercules Courtney, who is hereby appointed trustee for that purpose, do and shall, after the application of the personal estate of the said William Neill to the payment of his debts, set up and expose to sale, at public vendue, the several tracts and parcels of land and lots of ground in the proceedings mentioned, or such part or parts thereof as may be sufficient to pay and satisfy to the plaintiffs and others, creditors of the said William Neill, their several and respective claims; that is to say, all that tract of land, &c., (here the real estate is described, and then the decree proceeds,) after giving six weeks notice thereof, in the Annapolis and Baltimore newspapers, of the time and place of such sale, one-third of the purchase money, with interest, to be paid in twelve months, one-third thereof with interest in eighteen months, and the other third with interest in two years from the said sale; and the same tracts and parcels of land when so sold, or so much thereof as may be necessary for the purposes aforesaid, the said trustee do, and shall effectually convey and assure to the purchaser or purchasers thereof, their heirs and assigns, in fee, upon payment of the purchase money thereof, and interest to the said Hercules Courtney, as trustee aforesaid. And it is further *Decreed*, that the said trustee do and shall, as soon as the sales aforesaid are made, and upon his receipt of the purchase money, pay in due course of administration the plaintiffs and others, the creditors of the said William Neill, the amount of their respective claims. And it is further *Decreed*, that the said trustee do and shall, as soon as the several tracts of land, or so much thereof as may be necessary for the purposes aforesaid, are sold, obtain from the purchaser or purchasers thereof, bonds, with good and sufficient surety, for the payment of the consideration money and interest, and make and lodge in this court, under his hand, and with his affidavit of the truth thereof, thereto annexed, a just and accurate account of the said sales, to whom made, and when, and at what price the same were disposed of; and also as soon as may be after the receipt of the purchase money thereof, render to this court a full, just and true account of his payments and disbursements thereof, to whom made, and at what time or times. And it is further *Decreed*, that the said trustee do and shall, before any sale is made of the premises, in pursuance of this decree, execute and file in this court his bond to the state, with good and sufficient surety, in the penalty of £20,000 current money, well and faithfully to fulfil and perform the trust in him reposed by this decree. And it is further *Decreed*, with the consent of all parties concerned, that one-third part of the several parcels of land, herein before described, be reserved for the aforesaid Isabella, who, since filing this petition, hath intermarried with a certain Thomas McIntire, for and during her natural life, as, and for her dower in the said lands, in lieu and as a recompense for any bequest or provision, made or given to the said Isabella, by the said William Neill, in his last will and testament. And it is further *Decreed*, that the aforesaid trustee be allowed a commission of seven and one-half per centum, for his trouble in selling and disposing of the lands aforesaid, and paying away the money arising from the sale or sales according to the tenor and directions of this decree.—*Chancery Proceedings, lib. S. H. H. lett. B. fol. 201.*

FLEMMING v. CASTLE.—This bill, filed on the 31st of December, 1787, by James Flemming and others, creditors of John Castle of Frederick county, deceased, against John Castle, set forth that the deceased's personal estate was insufficient to pay his

count must be taken of the personalty; and the creditors must be notified to file the vouchers of their claims, so that that fact may be

debts; and that his real estate descended to the defendant, his infant son and heir. Whereupon it was prayed, that the real estate might be sold for the payment of the debts of the deceased, according to the directions of the act of assembly, in such case made and provided.

Jacob Staley was appointed guardian to the infant defendant, who by his answer admitted the facts stated in the bill.

29th April, 1788.—ROGERS, *Chancellor*.—This case standing ready for decision, and the bill, answer, and other proceedings appearing as before set forth. It is thereupon *Decreed*, with the assent of Jacob Staley, as guardian of the said John Castle, the minor, that the said Jacob Staley, and the said Jacob Staley is hereby appointed trustee for that purpose, do set up and expose to sale, and sell at public vendue to the highest bidder, upon the following terms, to wit: one-third part of the purchase money to be paid at the expiration of six months from the sale, two other third parts thereof to be paid at the expiration of eighteen months from the said sale, the aforesaid part of a tract of land called the Resurvey on Stoney Level, &c. &c., (as in the next preceding case.)

EWING v. ENNALLS.—This creditor's petition, filed on the 9th of May, 1789, by Ewing and others, against the executrix and heir of Thomas Ennalls, deceased, states, that the plaintiffs had recovered judgments at law against the testator in his life-time; who by his will appointed the defendant Ann his executrix, who qualified as such, administered all the personal estate, and had not assets in hand to satisfy their judgments: and that the deceased left real estate, which descended to Henry Ennalls, his infant son and heir, which the plaintiffs could not in any manner affect by their said judgments, during the minority of the said infant heir, but by the aid of this court. [*Bac. Abr. tit. Infancy and Age, L. 1.*] Whereupon it was prayed that the land be sold, &c.

The adult defendant put in her answer, and the infant defendant answered by his guardian *ad litem*. They admitted the truth of the facts set forth in the plaintiffs' petition; but alleged, that the said lands were subject to several claims for dower.

24th December, 1789.—HANSON, *Chancellor*.—*Decreed*, that the lands be sold, or so much thereof as shall be necessary to pay the debts herein mentioned, and the expense and commission, &c., subject to the right of dower of Ann Hodson, the mother of Thomas Ennalls, deceased, in two hundred and seven acres of Fork Neck; and the right of dower of the defendant Ann Ennalls, the widow of the said Thomas Ennalls, in the said land, &c. And the trustee shall, out of the money arising from such sale, pay and satisfy the plaintiffs, &c. their judgments, &c. And do and shall lodge in this court with the register, the net proceeds of the residue of the money arising from the said sale, when received, subject to future order. *Chancery Proceedings, lib. S. H. H. lett. C. fol. 583.*

SPRIGG v. MAGRUDER.—This creditor's petition, filed on the 16th of May, 1789, against the administrator and heir of the deceased debtor, stated, that the petitioner's claims exceeded the amount of the inventory, of the personal estate of their deceased debtor, Edward Magruder, who died intestate, leaving a considerable real estate, which had descended to his infant daughter and heiress, the defendant Margaret S. Magruder; whereupon it was prayed that the realty might be sold, &c.

The administrator, Robert Wade, by his answer, admitted the facts as stated; and the infant defendant in her answer by her guardian *ad litem*, also admitted the truth of the facts set forth in the petition.

determined before there can be a decree for a sale of the realty; or, even if the insufficiency of the personal estate be to some

6th February, 1790.—HANSON, Chancellor.—*Decreed*, with the consent and at the instance of Robert Wade, guardian of Margaret S. Magruder, that all the real estate of the said Margaret S. Magruder, be sold for the payment of the just debts of the said Edward Magruder, deceased, in and to the same, &c. that he first give six weeks notice, in the Annapolis and Baltimore newspapers, to the creditors of the said Edward Magruder to bring in to him, the said trustee, their respective claims legally proved; and the like notice of the time, place, and terms of sale, &c. And shall produce and lodge in this court with the register, the net proceeds of the money thence arising, to be subject to the future order and distribution of this court.—*Chancery Proceedings, lib. S. H. H. lett. C. fol. 276.*

McMULLIN v. BURRIS.—This bill, filed on the 22d of July, 1790, states that the late Edward Burris died leaving real and personal estate; that two of the plaintiffs, as his administrators, had fully administered the whole of his personal estate, and had overpaid just debts; and that others of the plaintiffs were also creditors of the deceased; whereupon it was prayed that the real estate might be sold for the payment of the debts of the deceased.

The defendant's infant heirs answering by their guardian *ad litem*, admitted the facts as stated in the bill.

8th May, 1792.—HANSON, Chancellor.—This case standing ready for hearing on the bill and exhibits, and on the answer of the defendants by their guardian Thomas McMullin, together with the other exhibits and proceedings in this cause, the same were read, and by the court considered; and it appearing to this court, by the admissions of the said defendants, by their guardian, in the answer aforesaid, and also by the exhibits aforesaid, that the personal estate of the said Edward Burris is insufficient to pay his debts, and that he left real estate to descend to the said John Burris and James Burris, who were, at the time of his death, and still are, infants.

It is thereupon *Decreed*, that the real estate of the said Edward Burris, consisting of a tract of land called Stoney Battery, containing one hundred and fourteen acres, lying in Cecil county, which has descended to the said John and James Burris, be sold for the payment of the debts of their said father Edward Burris; that Richard Thomas, of said county, be, and he is hereby appointed, trustee to sell the said real estate, and that the manner of his proceeding be as follows: he shall first give notice by advertisement, inserted four weeks successively in the newspaper of Goddard & Angel, and set up in the most public places in the county, to the creditors of the late Edward Burris, who have not already exhibited their claims in this court, to bring in their respective claims legally proved, and lodge the same with the register of this court. And the said trustee shall then, in like manner, give four weeks notice of the time, place and terms of sale of the said real estate, which shall be by auction, the purchaser or purchasers giving bonds, with approved surety, for the payment of the consideration money, with interest, at two equal annual payments, reckoning from the time of sale. And the said trustee shall, if the purchaser or purchasers will thereto agree, divide the purchase money to be paid by the purchaser or purchasers into four or more parts, and take a separate bond for each part, in order that the same may be assigned among the creditors, in case they shall so elect, and it shall hereafter appear to this court proper to be so done. And when the said real estate shall have been sold, and the confirmation, by the Chancellor, of the sale shall have been obtained, and the purchase money paid to the said trustee, he shall, as

extent admitted, not denied, or established, still, for the benefit of the heirs or devisees, the creditors may be notified to bring in their

trustee aforesaid, effectually convey and secure the said real estate, and the whole right, title and interest in the same, of the said John Burris and James Burris, which hath descended to them as aforesaid, to the purchaser or purchasers thereof, in fee simple. And the said trustee shall, as soon as conveniently may be after the sale aforesaid, make and lodge in this court, under his hand, with an affidavit of the truth thereof annexed, a just and accurate account of the sale, specifying the purchaser or purchasers, the time of sale, and the price or prices at which the said real estate has been sold, and the bonds taken for the purchase money, and specifying the expense of the whole proceeding; and that he shall bring into this court the bonds by him taken on the sale, and the money arising from such sale, to be applied in satisfying the just claims against the said Edward Burris' estate, after deducting all the legal costs of this suit, and a commission hereafter to be allowed. Provided that before any disposition shall be made of the said real estate in pursuance of this decree, by the said trustee, further than giving the notices aforesaid first directed, he shall execute and lodge in this court his bond, with an approved surety or sureties, to the state, in the sum of £300, current money, well and truly to fulfil and perform the trust in him reposed by this decree, or to be reposed by any future decree in the premises, and in all things honestly and truly to observe and execute the same according to the directions and true meaning thereof.

In pursuance of this decree, the trustee executed and filed his bond, which was endorsed thus: 'Wm. Pinkney is well acquainted with the circumstances of Mr. Thomas, and begs leave to inform the Chancellor, that the within bond is ample security for the performance of his trust;' upon which, it was 'approved, A. C. Hanson, ch. 8, Octo. 1792.' After which, on the 17th of October, 1792, the trustee reported that he had, on the 7th of September previous, sold the said estate. Upon which, an order of ratification *nisi* was passed on the 21st of October, 1792, which, as it would seem, was never published as directed.

27th December, 1803.—HANSON, Chancellor.—Ordered, that the sale made by Richard S. Thomas, trustee for the sale of the real estate of Edward Burris, be absolutely ratified and confirmed, no cause being shewn, &c. although many years have elapsed. The trustee is allowed a commission of £12 10s. 0d. for his whole trouble and expense.—M. S.

LANSDALE v. CLARKE.—This bill was filed on the 9th of June, 1796, by a mortgagee against the heirs of the mortgagor for a foreclosure or sale, one of the heirs being of full age, and two others being infants.

29th November, 1797.—HANSON, Chancellor.—The papers in this cause being submitted on the idea that it was ready for a decree on the bill and answers, the same were, by the Chancellor, read; and it appears that, although there is a regular answer of the infant defendants Eleanor and Samuel, by their guardian, admitting the facts stated in the bill, there is no regular answer on the part of the other defendants. However, that there may be as little further delay as possible, the Chancellor thinks proper to pass immediately that order which is required by law, before a mortgagee can obtain a decree for a sale against infant defendants, heirs of a mortgagor.

It is thereupon Ordered, that in case the aforesaid facts shall be admitted by the answers of all the defendants, or otherwise established to the Chancellor's satisfaction, he will pass a decree for the sale of the mortgaged lands in the bill mentioned, for the payment of the mortgage debt; provided the complainant shall first file with

claims in order to ascertain what proportion of the real estate must be sold. (*f*) If, on thus taking an account of the personal estate, it should be clearly shewn to be abundantly sufficient to satisfy all the creditors of the deceased, then the suit may, thenceforward, be confined to the administration of the personal estate alone, continuing the personal representatives only as defendants, and dismissing the bill as against the heirs. But, it is the habit of the court, where the insufficiency of the personal estate is admitted or shewn, and it thus foresees that the real estate must be sold, to decree a sale of it immediately without setting the case down for final hearing. (*g*)

The establishment of some claim of a creditor, and the insufficiency of the personal estate to discharge the debt due by the deceased, thus shewn, or not denied by the heirs, being the foundation on which a decree for a sale of the realty must rest; and without which it could not have been passed, such a decree, therefore, necessarily establishes the validity of such claim, and the insufficiency of the personalty, without leaving those matters open to any further question by any of the immediate parties to it. (*h*) And as the coming in, under such decree, implies a submission to it, no creditor, who thus comes in, can be allowed to impeach it; except on the ground of fraud among the original parties to it; and in so far as it injuriously affects his interests, by making a wrong disposition of the property. (*i*) If a part only of the claim of the plaintiff be sustained, the decree should specify what part has been established; and how much has been finally rejected, or is to be allowed to stand over to be again brought forward, upon further proof, with the claims of other creditors; but if no such specification be made, then it must be assumed, that the decree has finally established the validity of all the claims of the several plaintiffs. (*j*) And although the personal estate may not be suffi-

the register of this court a bond to the infant defendants Eleanor Clarke and Samuel Clarke, with good and sufficient surety, approved by the Chancellor, in the penalty of £400, with the following condition, &c. (This bond was required by 1785, ch. 72, s. 2, but it has been since declared that it shall not be necessary or required, 1837, ch. 292.)

(*f*) *Corrie v. Clarke*, 1 Bland, 85, note.—(*g*) *Holme v. Stanley*, 8 Ves. 1; *Lloyd v. Johnes*, 9 Ves. 65; *Birch v. Glover*, 4 Mad. 376; *Kilty v. Brown*, ante 222; *Boucher v. Bradford*, ante 222; *Tyson v. Hollingsworth*, ante 327; 1835, ch. 380, s. 1; *Chamberlain v. Brown*, ante 221.—(*h*) *Mackubin v. Brown*, 1 Bland, 415.—(*i*) *Giffard v. Hort*, 1 Scho. & Lefr. 409.—(*j*) *Strike's Case*, 1 Bland, 68; *Mackubin v. Brown*, 1 Bland, 414; *Williamson v. Wilson*, 1 Bland, 441; *Chamberlain v. Brown*, ante 221; *Boucher v. Bradford*, ante 222; *Kilty v. Brown*, ante 222.

cient to pay all ; yet if it appears, that there is still a portion of it to be accounted for, and distributed, then the same decree, which directs a sale of the realty, should also require the executor, or administrator to account for the personalty ; and, if the creditors have not been previously called in, the same decree should moreover direct the trustee appointed to make the sale, to give them notice, at the time of advertising the real estate for sale, to file the vouchers of their claims in the chancery office.

Such a decree virtually takes possession of the property and vests it in the court, for the purpose of distribution ; (*k*) and, consequently, the court may thenceforward exercise over it all such control and authority as may be necessary for its beneficial preservation. If it cannot be immediately sold, it may be rented, or disposed of in the mean time, to the best advantage ; (*l*) the committing of any waste upon it, may be prohibited by injunction ; (*m*) or a receiver may be put upon it to collect and take care of its rents and profits. (*n*) The trustee appointed to make the sale, being the mere agent of the court ; (*o*) it is the court who must be regarded as the vendor ; and as the holder of the vendor's equitable lien. (*p*) The trustee, without incumbering the report of his proceedings, with any thing more than a concise reference to the decree ; and a brief averment, that he had, in all respects, complied with its directions ; or if not, with a statement of the way in which he had departed from those directions, should clearly and distinctly set forth the date and terms of the contract of sale which he had made with the purchaser, naming him ; and which contract he thus submitted to the court for its confirmation or rejection.

So soon as the court has, by a decree, assumed the general administration of the assets, it will on motion or petition ; (*q*) and without, as formerly, a second bill filed for that purpose, (*r*) interpose by injunction ; and stop in its progress to judgment, an action at law, brought by any creditor for payment of his debt ; (*s*) and

(*k*) *Shewn v. Vanderhorst*, 4 Cond. Cha. Rep. 461 ; *The Commonwealth v. Ragsdale*, 2 Hen. & Mun. 8.—(*l*) *Williams' Case*, post, 3 vol.—(*m*) *Casamajor v. Strode*, 1 Cond. Cha. Rep. 195 ; *Duval v. Waters*, 1 Bland, 576.—(*n*) *Jones v. Pugh*, 8 Ves. 71.—(*o*) April, 1737, ch. 30, s. 5.—(*p*) *Iglehart v. Armiger*, 1 Bland, 527 ; *Andrews v. Scotton*, post.—(*q*) *Paxton v. Douglas*, 8 Ves. 520 ; *Gilpin v. Southampton*, 18 Ves. 469.—(*r*) *Douglas v. Clay*, 1 Dick. 393 ; *Hardcastle v. Chettle*, 4 Bro. C. C. 163 ; *Jackson v. Leaf*, 1 Jac. & Wal. 231 ; *Clarke v. Ormonde*, 4 Cond. Cha. Rep. 54.—(*s*) *Brooks v. Reynolds*, 1 Bro. C. C. 183 ; *Kenyon v. Worthington*, 2 Dick. 668 ; *Goate v. Fryer*, 2 Cox, 201 ; S. C. 3 Bro. C. C. 23 ; *Hardcastle v. Chettle*, 4 Bro. C. C. 163 ; *Paxton v. Douglas*, 8 Ves. 520 ; *Terrewest v. Featherby*, 2 Meriv. 480 ;

although the name of such creditor was, without his consent, inserted in the bill filed on behalf of all the creditors of the testator; (*t*) or to restrain an action brought by a lessor against an executor, as executor, for a breach of covenant to repair; since the fact of a breach, and the damages may be as well ascertained by the auditor as by a jury. (*u*) And the like injunction may be obtained, not only where the bill is filed by creditors; but also where it is filed by an executor to have the directions of the court for the execution of the will, and to be indemnified; (*w*) or for the same purposes, by trustees of the testator's estate; (*x*) or where it is filed by a residuary or other legatee; (*y*) and the injunction may be obtained on the application of an executor, where the bill is filed by creditors; (*z*) or by trustees; (*a*) or on the application of a creditor plaintiff, the bill being filed by creditors against the executor; (*b*) or on the application of a legatee, by whom the bill is filed against the executor. (*c*)

But, in granting an injunction, in cases of this kind, in order to protect the real or personal representatives from pressure at law, the court is always careful not to exclude creditors, proceeding at law, from the benefit of their diligence, by which they have established a right to be satisfied, either out of the assets of the deceased, or *de bonis propriis* of the representative; a right which, in some cases, the conduct of the representative will confer on them, and in others their activity; and will not indulge creditors who have lain by to the extent of depriving the diligent of the fruits of their diligence. (*d*) And, therefore, an injunction may be obtained to shelter assets against execution under a judgment against the heir or executor; (*e*) as where after a decree to account, a creditor proceeds to trial at law, and there obtains a verdict; (*f*) or where

Clarke v. Ormonde, 4 Cond. Cha. Rep. 47; Lord v. Wormleighton, 4 Cond. Cha. Rep. 67; Fielden v. Fielden, 1 Cond. Cha. Rep. 128; Drewry v. Thacker, 3 Swan. 529; Martin v. Martin, 1 Ves. 211; Farnham v. Burroughs, 1 Dick. 63.—(*t*) Douglas v. Clay, 1 Dick. 393; Perry v. Phelps, 10 Ves. 40.—(*u*) Sutton v. Mashiter, 2 Cond. Cha. Rep. 525.—(*w*) Rush v. Higgs, 4 Ves. 638.—(*x*) Brooks v. Reynolds, 1 Bro. C. C. 183.—(*y*) Jackson v. Leaf, 1 Jack. & Wal. 231.—(*z*) Clarke v. Ormonde, 4 Cond. Cha. Rep. 54.—(*a*) Brooks v. Reynolds, 1 Bro. C. C. 183.—(*b*) Terrewest v. Featherby, 2 Meriv. 482, n.—(*c*) Clarke v. Ormonde, 4 Cond. Cha. Rep. 54; Drewry v. Thacker, 3 Swan. 544.—(*d*) Drewry v. Thacker, 3 Swan. 544; Fielden v. Fielden, 1 Cond. Cha. Rep. 128; Price v. Evans, 6 Cond. Cha. Rep. 234; Kent v. Pickering, 7 Cond. Cha. Rep. 541.—(*e*) Terrewest v. Featherby, 2 Meriv. 480; Clarke v. Ormonde, 4 Cond. Cha. Rep. 54; Price v. Evans, 6 Cond. Cha. Rep. 234.—(*f*) Lord v. Wormleighton, 4 Cond. Cha. Rep. 67.

after such decree, the executor suffers judgment by default; (*g*) although so far as a judgment may affect the executor's own property, the court will not interfere to protect him. (*h*) And if a bond creditor has got a judgment against the executor or heir, before the decree, then after the decree, although such creditor may come in and prove accordingly, as a judgment creditor, against the personal, or the real estate in the hands of the executor or heir; yet the court will, on application, grant an injunction to prevent him from taking out execution against the assets. (*i*)

The principle upon which an injunction rests in such cases, is, that substantially, a bill by a creditor, in behalf of himself and all others; or a suit by any one, in which all the creditors may be represented, and allowed to come in to obtain satisfaction, is considered as making all of them parties to it; and that the decree is in the nature of a judgment for them all; and, therefore, the court, to prevent difficulty, confusion, and injustice; and to sustain its jurisdiction, thus assumed over the administration of the estate, will never permit another suit to be instituted for the same object, with the same parties, and directed to the same relief. If the relief in the first suit can be extended; if expense can be saved by incorporating with it any proceeding which will avoid the necessity of a second bill, there is an obvious propriety in not permitting another suit to go on. But a second suit may be rendered necessary either, by collusion in the former suit; or by its having left out some principal matters of charge; or by its having omitted, from ignorance or negligence, some important ground of relief. (*j*)

Such an injunction may, however, in some cases be made an instrument of fraud and injury to the whole body of the creditors, by persons, who have more interest in forbearing than urging their demands against the representatives of the deceased, so managing it as to leave the representatives in almost as undisturbed enjoyment of the assets as before the bill was filed. To prevent such an abuse of its authority, the court, when asked for such an injunction, may look into the answer of the executor or administrator and see what amount he admits to be in his hands; or if he has not there stated

(*g*) *Terrewest v. Featherby*, 2 Meriv. 480.—(*h*) *Terrewest v. Featherby*, 2 Meriv. 480; *Drewry v. Thacker*, 3 Swan, 529.—(*i*) *Surrey v. Smalley*, 1 Vern. 457; *Drewry v. Thacker*, 3 Swan. 429; *Clarke v. Ormonde*, 4 Cond. Cha. Rep. 54; *Price v. Evans*, 6 Cond. Cha. Rep. 234.—(*j*) *Coysgarne v. Jones*, Amb. 613; *Law v. Rigby*, 4 Bro. C. C. 60; *Clarke v. Ormonde*, 4 Cond. Cha. Rep. 47; *Pickford v. Hunter*, 6 Cond. Cha. Rep. 342; *Calvert on Parties*, 222.

it, may order him to make affidavit of the amount, and to bring into court that, if any, which he so admits to be in his hands. Yet it is not an absolute rule of the court to refuse an injunction, unless there is an affidavit stating the assets in the hands of the personal representative. Or, should a case arise, of assets wasted by a personal representative, from the neglect of the solicitor, by whom the suit was conducted, the court would hold him responsible; (*k*) or should there be any improper delay by the original plaintiff, any one, who has been allowed to come in as a creditor or party, may be permitted to take his place, and prosecute the suit. (*l*) For, although a plaintiff, who sues on behalf of himself and all other persons of the same class, as he acts upon his own mere motion, and at his own expense, retains the absolute dominion of the suit, until another has been admitted as a co-plaintiff, or until a decree to account, and may dismiss the bill at his pleasure; yet, after another has been admitted as a co-plaintiff, or a decree has been passed, he cannot, by his conduct, deprive other persons of the same class, who thus become actors, of the benefit of the suit if they think proper to prosecute it. (*m*)

I am, therefore, of opinion, that this is, in effect, and may properly be considered as a creditor's suit; although it is not expressly alleged to have been instituted for the benefit as well of the creditors of the testator, as of these plaintiffs; and that the order directing notice to be given to the creditors of the late *Philip Hammond* to bring in their claims, was, in every respect, proper; and must have the effect and operation of allowing a satisfaction to be awarded to those creditors who shall come in as thus warned, and of making a distribution of the residue of the estate among the respective claimants. And, moreover, that the injunction granted on the 29th of September last, to prevent the creditor, *Ridgely*, from proceeding at law on the judgment he had obtained against these executors, was proper and well warranted by the nature of the case.

In order to ascertain who are creditors, and also, where necessary, who are the next of kin of the deceased, the court directs public notice to be given by advertisements in newspapers, or

(*k*) *Paxton v. Douglas*, 8 Ves. 520; *Gilpin v. Southampton*, 18 Ves. 469; *Drewry v. Thacker*, 3 Swan. 544; *Clarke v. Ormonde*, 4 Cond. Cha. Rep. 54.—(*l*) *Creuze v. Hunter*, 2 Ves. jun. 165; *Sims v. Ridge*, 3 Meriv. 458; *Powell v. Wallworth*, 2 Mad. Rep. 183; *Edmunds v. Acland*, 5 Mad. 31.—(*m*) *Lashley v. Hogg*, 11 Ves. 602; *Dyott v. Anderton*, 3 Ves. & Bea. 177; *Handford v. Storie*, 1 Cond. Cha. Rep. 414; *Strike's Case*, 1 Bland, 85.

otherwise, subject to the restrictions of the act of assembly, (*n*) in those quarters where creditors and next of kin are most likely to be found, calling on them to come in and file the vouchers of their claims in the chancery office, usually within four months from the day appointed for the sale of the real estate. And when that time has expired, it being considered that the best possible means have been taken to ascertain the parties really entitled, the auditor is then, and not before, allowed or directed to make a statement and distribution of that amount of the personalty, if any; and of the proceeds of the sale of the realty, after the sale has been finally ratified, among the claimants. It is, however, obvious, that the parties really entitled may never have seen or heard of the advertisements, or of the suit; and, therefore, it would be the height of injustice, that the proceedings of the court, wisely adopted with a view to general convenience, should have the effect of conclusively applying the fund unequally and wrongfully; or of transferring the property of the true owner to one who had no right to it. And, therefore, the court will, at any time before it has actually parted with the fund, upon the application of a claimant, let him in, and send the case again to the auditor, to have the distribution recast at his expense; except, indeed, as to small claims, which can be satisfied out of the accruing interest of the purchase money of the real estate which had been sold, without incurring the expense of a re-statement. (*o*)

If, however, a part only of the fund remains in court, such part will be charged with no more than its due proportion, leaving the

(*n*) 1826, ch. 178.—(*o*) *Giffard v. Hort*, 1 Scho. and Lefr. 409; *Lashley v. Hogg*, 11 Ves. 602; *Angell v. Haddon*, 1 Mad. Rep. 529; *David v. Frowd*, 7 Cond. Cha. Rep. 8.

FRAZER HONYWOOD, by his will, gave £20,000, upon trust, to be distributed among such of his relations by consanguinity, who should not each be worth more than £2,000; and who should, within two years after his death, apply to participate in the donation. And, that they might be apprised of it, directed that notice should be given by advertisement in the London Gazette, and such other newspapers as his executors should think proper, once a month, for two years after his death. The testator died on the 28th of January, 1764; and the executors having advertised, as directed, applications were made within the two years by four hundred and fifty-six persons who resided in different parts of the world, to wit: England, Scotland, Ireland, Spain, Portugal, Antigua, Jamaica, and South Carolina. After which, the case was heard, and a distribution made accordingly. *Bennett v. Honywood*, Amb. 708. There have been several creditors' suits in this court, within the last ten years, in which, on a notice of only four months, more than one hundred and fifty creditors have come in under the decree. *Simmons v. Tongue*, post.

claimant to seek satisfaction for the residue from the next of kin, legatees, heirs or devisees to whom the other shares of the fund had been actually paid. But after the court has actually parted with the whole fund, upon a bill filed by a creditor, next of kin, heir, or devisee against those alleged representatives of the deceased, among whom the property had been distributed, the court will, upon proof of no wilful default on the part of such creditor, next of kin, heir or devisee; nor any want of reasonable diligence, compel the next of kin or distributees to pay or restore to such plaintiff that to which he may appear to be justly entitled. (*p*) But if the whole estate has been distributed and actually paid over to the *creditors* of the deceased, or in so far as it had been so actually paid away, then, as such creditors cannot be made to refund, claimants of, and under the deceased debtor, who may thereafter come in, can take nothing by their application; not upon the ground, that their claims are without foundation; but because by their negligence they have lost all means of relief. (*q*)

A publication warning all claimants, unknown to the court, to come in and file the vouchers of their claims against the estate, is a constructive notice, upon which it is presumed to be safe to proceed to make a distribution of it among all those who then, after such notice, shall have come in and made claim. That, however, cannot apply to a legatee, or any other claimant who then fails to come in and assert his right, but whose title appears upon the face of the proceeding; and who must, therefore, have a proportional share of the fund set apart for his satisfaction. (*r*)

Should a claimant find it necessary, for any purpose advantageous to himself, to introduce any matter, not apparent upon the face of the voucher of his claim, he may be permitted to do so by petition; or if the relief he seeks cannot be so obtained he may file a cross bill. (*s*) But the most usual way for a creditor to come in is by merely filing the voucher of his claim with such an affidavit

(*p*) *Hercy v. Dinwoody*, 4 Bro. C. C. 268; *Good v. Blewitt*, 19 Ves. 337; *Gillespie v. Alexander*, 3 Cond. Cha. Rep. 330; *Greig v. Sumerville*, 4 Cond. Cha. Rep. 457; *David v. Frowd*, 7 Cond. Cha. Rep. 8; *Mitf. Plea*. 166; 2 Fow. Exch. Pra. 253, 279; *Strike's Case*, 1 Bland, 86; *Williamson v. Wilson*, 1 Bland, 441; *Dorsey v. Hammond*, 1 Bland, 468.—(*q*) *Lowthian v. Hasel*, 4 Bro. C. C. 168; *Hindman v. Clayton*, ante 337; 1798, ch. 101, sub ch. 8, s. 13.—(*r*) *Good v. Blewit*, 19 Ves. 338; *Waite v. Temple*, 1 Cond. Cha. Rep. 162; *Anonymous*, 4 Exch. Rep. 72.—(*s*) *Latouche v. Dunsany*, 1 Scho. and Lefr. 149; *Strike's Case*, 1 Bland, 85.

annexed as is required for authenticating such a claim in the Orphans Court. (*t*) The meaning of which practice is, that a person should not come here, and claim a debt without giving that assurance, that it is due, which arises from his affidavit; which also, if the debt be contested, affords a protection against the conclusion from other evidence, that it is due, when the contrary may be within the knowledge of the party himself; (*u*) and moreover, because of its being proper to follow the rule prescribed for the Orphans Court, under similar circumstances, in order that there may be a consistency in the administration of justice. But if the claim be contested, as it may, by a plaintiff, a defendant, or any one who has been allowed to come in, and whose interest may be affected by it, no attention is to be given to the affidavit, the claim must be established by full proof as on issue joined before a jury; or it will be rejected. The admission of, or even a judgment against an executor or administrator can be of no avail against the heir or devisee. (*w*) And if all the original parties to the suit should waive the statute of limitations, still it may be relied on by any one who comes in, and may have an interest to protect by relying on the statute. (*x*)

In general no claim can be considered as a debt due by the deceased; and, as such, entitled to be paid out of his estate, but that which he owed at the time of his death, and was then, or thereafter payable; and the balance only of such a claim, for which the deceased was then liable, is the amount to be satisfied in whole, or in due proportion. (*y*) Where the assets are sufficient to pay all the creditors of the deceased; or where there is an ample solvent fund, it cannot be necessary to attend to the order in which the debts are satisfied, or to adjust any apportionment among them; since nothing can be awarded to the next of kin or legatees, heirs or devisees of the deceased, or to the debtor himself until all his creditors have been satisfied to the full amount of their respective claims, principal and interest; for if a creditor is entitled to any interest it is as much a debt as the capital itself. (*z*)

(*t*) 1798, ch. 101, sub ch. 9.—(*u*) *Fladong v. Winter*, 19 Ves. 199.—(*w*) *Putnam v. Bates*, 3 Cond. Cha. Rep. 355; *Dorsey v. Hammond*, 1 Bland, 470.—(*x*) *Shewen v. Vanderhorst*, 4 Cond. Cha. Rep. 458; S. C. 6 Cond. Cha. Rep. 403; *Strike's Case*, 1 Bland, 91.—(*y*) As to annuities, *William's Case*, post. 3 vol.—(*z*) *Bromley v. Goodere*, 1 Atk. 75; *Rowe v. Bant*, 1 Dick. 150; *Lloyd v. Williams*, 2 Atk. 111; *Ex parte Morris*, 3 Bro. C. C. 79; *Ex parte Champion*, 3 Bro. C. C. 436; *Ex parte Mills*, 2 Ves. jun. 295; *Ex parte Clarke*, 4 Ves. 677; *Ex parte Reeve*, 9 Ves.

A statement liquidating the amount due to each creditor, inclusive, or exclusive of interest, must always be made, in a creditor's suit, according to the nature of each claim. And therefore, it is necessary, in all such suits, that the nature of the claim for interest, and the mode of computing it should be attended to, in order, that a correct distribution may be made, even where the fund may be sufficient to pay all; and more particularly so where, the estate being insufficient, the several claimants can only be satisfied in part and in due proportion.

Interest on money is defined to be the compensation which the borrower pays to the lender for the profit which he has an opportunity of making by the use of the money; part of that profit naturally belonging to the borrower who runs the risk, and takes the trouble of employing it; and part to the lender who affords him the opportunity of making the profit. (a) According to this definition, it is only that part of the interest which belongs to the lender, and which he may legally sue for and recover, that is now, and so often becomes the subject of judicial consideration.

In England, according to the principles of the common law, interest was not allowed upon a sum certain, payable at a given day. The action of debt being the only mode of recovering a sum certain, except where there was a breach of covenant; and, in that action, the defendant being commanded to render to the plaintiff the debt, or shew cause, the payment of the specified debt, without any thing more, answered the action and put an end to the suit. And thus, interest forming no proper part of the original debt at law, it was held to be created only by the nature of the security. This general rule, it is said, prevents acts of kindness from being converted into mercenary bargains; and, by making it the interest of traders to press for payment, thereby checks that pernicious extension of credit which is so often ruinous to both parties. (b) But in debt upon a bond, with a condition to pay a lesser sum, the defendant was authorized by a statute to make satisfaction by the payment of the lesser sum with inte-

590; *Butcher v. Churchill*, 14 Ves. 573; *Ex parte Kock*, 1 Ves. & Bea. 344; *Bertie v. Abingdon*, 3 Meriv. 566; *Turner v. Turner*, 1 Jac. & Wal. 39; *Ex parte Deey*, 2 Ball & Bea. 77; *Dickenson v. Harrison*, 2 Exch. Rep. 105; *Pow. Mortg.* 291; *Chase v. Mauhardt*, 1 Bland, 346.—(a) *Smith's Wealth Nat. lib.* 1, ch. 6, p. 72; 2 *Fonb.* 423—(b) *Anderson v. Dwyer*, 1 Scho. & Lefr. 303; *Higgins v. Sargent*, 9 Com. Law Rep. 101; *Arnott v. Redfern*, 13 Com. Law Rep. 1; *Fruhling v. Shreder*, 29 Com. Law Rep. 260.

rest. (c) And, in many other cases, where there is either an express or implied contract or usage of trade requiring interest to be paid, as on negotiable notes and the like, the English courts of common law give interest down to the day of signing the judgment. (d) And so too, where there has been a wrongful withholding of the debt, the jury is permitted to bring in a verdict allowing interest in the shape of damages for the detention of the money. But, in general, no interest is ever given, by the English courts, upon mere simple contract debts, as for goods sold and delivered, &c. (e) A plaintiff is not suffered to sue out execution, in any case, for more than the whole amount awarded to him by his judgment; yet if his judgment be not satisfied, he may bring an action of debt upon it, in which the whole accumulated amount of it, constituted of the principal and interest of the debt, or the damages assessed, and the costs, considered as one entire debt will be allowed to carry interest until the signing of judgment in such action. (f)

In Maryland interest on money is not only given in all cases where, in England, it would be awarded to the creditor; but, in many other cases where, according to the English law, he would not be allowed to recover any thing in the nature of interest for the detention of his money. It is here given by the court, or left to the jury, as in some cases in England, to give or not, at their pleasure, in almost all kinds of cases; (g) as on a claim for rents and profits; (h) for rent; (i) for the value of goods replevied; (j) for the value of land not conveyed according to contract; (k) for money which had been actually used; (l) for the balance due on an account stated; (m) for a sum of money which the defendant,

(c) 4 Ann, ch. 16, s. 12, 13; Tidd Pra. 484.—(d) *Robinson v. Bland*, 2 Burr. 1085; *Pierce v. Fothergill*, 29 Com. Law Rep. 296.—(e) *Blaney v. Hendrick*, 3 Wils. 205; *Gordon v. Swan*, 12 East. 419; *Marshall v. Poole*, 13 East. 98; *Calton v. Bragg*, 15 East. 223.—(f) *Bodily v. Bellamy*, 2 Burr. 1095; *Entwistle v. Shepherd*, 2 T. R. 78; *Creuze v. Hunter*, 2 Ves. jun. 162, 167; *Arnott v. Redfern*, 13 Com. Law Rep. 1; *Churcher v. Stringer*, 22 Com. Law Rep. 183; *Watkins v. Morgan*, 25 Com. Law Rep. 584; *Pierce v. Fothergill*, 29 Com. Law Rep. 296; *Petersdorff's Abr. tit. Interest*.—(g) *Francis v. Wilson*, 21 Com. Law Rep. 391; *Bann v. Dalzel*, 14 Com. Law Rep. 356; S. C. 22 Com. Law Rep. 299; *Newson v. Douglass*, 7 H. & J. 453; *Karthauss v. Owings*, 2 G. & J. 445.—(h) *Davis v. Walch*, 2 H. & J. 344; *Hannah K. Chase's Case*, 1 Bland 232; *Ferrers v. Ferrers*, Ca. Tem. Talb. 2.—(i) *Williams v. The Mayor of Annapolis*, 6 H. & J. 529.—(j) *Karthauss v. Owings*, 2 G. & J. 445.—(k) *Cannell v. M'Clean*, 6 H. & J. 300.—(l) *Newson v. Douglass*, 7 H. & J. 453.—(m) *Contee v. Findley*, 1 H. & J. 331; *Bordley v. Eden*, 3 H. & McH. 167.

by his receipt, promised to return 'when called on to do so;' (*n*) and the like. By an English statute, passed in the year 1705, and adopted here, it is declared, that, in an action on a bond, with a condition for the payment of a lesser sum, the defendant may plead the payment of the principal and interest due by the condition in bar; or may, pending the suit, bring such principal and interest into court in satisfaction of the debt. (*o*) And, by a legislative enactment of the provincial government, it was declared, that the courts of common law might assess damages and give final judgment in all actions of the case upon assumpsit, whether the same should be entered upon default, demurrer, or confession without a writ of inquiry. (*p*) Under this authority, and in accordance with the English practice, the court itself, in all actions upon bills of exchange and promissory notes; and, in some other cases, where interest was allowed in the shape of damages, calculated the interest, added it to the principal, and gave judgment for the whole amount thus found due. (*q*) This provincial law having been repealed by an act confined, by its terms, to cases after an interlocutory judgment where the plaintiff was entitled to a writ of inquiry; and where the damages sustained could not be ascertained without the intervention of a jury; (*r*) the courts still continue to exercise the power, as formerly, in actions on bills of exchange, and the like, of calculating the interest, and entering up judgment for the whole, thus ascertained, and costs. (*s*)

In the year 1760, it was declared, by the court of King's Bench, of England, that nothing could be more agreeable to justice, than that interest should be carried down to the actual payment of the money. (*t*) Yet notwithstanding the obvious correctness of this position, owing to the strict forms by which the courts of common law were tied up, interest has never, in England, been carried down farther than to the day of signing judgment; nor here until lately, and that only exclusively of costs. Although it had always been the course of the courts of equity, as well in England as here, in ordering the payment of money, on which interest was

(*n*) *Darnall v. Magruder*, 1 H. & G. 439.—(*o*) 4 Ann, ch. 16, s. 12, and 13; *Kilty Rep.* 246; *Godfrey v. Watson*, 3 Atk. 517; *Creuze v. Hunter*, 2 Ves. jun. 167.—(*p*) 1722, ch. 6.—(*q*) *Thelluson v. Fletcher*, 1 Doug. 316; *Shepherd v. Charter*, 4 T. R. 275.—(*r*) 1794, ch. 46; *Wilmer v. Harris*, 5 H. & J. 8; *Hopewell v. Price*, 2 H. & G. 275.—(*s*) 2 Harris' Ent. 87.—(*t*) *Robinson v. Bland*, 2 Burr. 1086.

allowable, to direct interest to be carried down to the time of the actual payment, or the bringing of the money into court. (*u*)

It has been declared by an act of assembly, that, in all actions brought for the penalty of any bond or contract, the jury may, under the direction of the court, upon the plea of payment or performance, find what sum of money is really due to the plaintiff; upon which judgment shall be entered for the penalty to be released upon the payment of the sum so found due, and interest on the same until paid and costs. (*w*) So that, under this act, the plaintiff may, as in an action of debt upon a judgment, recover further interest, except on the costs, upon the aggregate amount of his judgment, and have his execution thereon levied accordingly. As for example, if the debt really due was \$100, with \$30 interest, the jury would be directed to find a verdict for \$130, upon which judgment would be entered with interest on the same from the day of signing the judgment until paid. (*x*) It had also become usual, in the courts of common law, in actions of debt, assumpsit, &c. where the defendant *confessed* judgment, to enter it for the amount claimed in the declaration, with a memorandum at the foot of the judgment, that it should be released on the payment of the whole sum then due, with interest thereon from that day until paid, and costs of suit. (*y*) After which it was enacted, that all judgments by default, and in all cases where a verdict should be given, the judgment thereon should carry interest in the *same manner* as in cases of a *confession* of judgment. (*z*)

Equity, in this respect, follows the law; or, rather has always pursued a similar course, and allows interest in all cases where, under like circumstances, it might be recovered at law. (*a*) And therefore, as a judgment here, as in England, always had the effect of converting the interest then due into principal, so that, in an action of debt, interest might be recovered upon the whole amount; and as such subsequent interest may now be levied here under a *fieri facias*. (*b*) So upon the whole amount awarded by an

(*u*) *Creuze v. Hunter*, 2 Ves. jun. 165; *Millar v. Baker*, 1 Bland, 148, note; *Long v. Gorsuch*, 1 Bland, 361, note; *Parker v. Mackall*, ante 62; *Woodward v. Chapman*, ante 68; *Sloss v. McIlvane*, ante 72; *Craig v. Baker*, ante 238.—(*w*) 1785, ch. 50, s. 13.—(*x*) 2 Harris' Ent. 192.—(*y*) 2 Harris' Ent. 87, 97.—(*z*) 1809, ch. 153, s. 4; 1811, ch. 161, s. 5; *Hawkins v. Jackson*, 6 H. & J. 151.—(*a*) *Parker v. Hutchinson*, 3 Ves. 133; *Upton v. Ferrers*, 5 Ves. 803; *Dornford v. Dornford*, 12 Ves. 129; *Lowndes v. Collens*, 17 Ves. 28.—(*b*) *Gwinn v. Whitaker*, 1 H. & J. 754.

order or decree of this court, subsequent interest is, to the same extent, and in like manner, recoverable. The auditor, in a creditor's suit, always makes a statement of the claims of the creditors, allowing interest to each, if entitled to it; and, the aggregate thus shewn, is considered as the liquidated debt then due to each; and an order confirming such a statement, is a judgment of the court in favour of each creditor, which, like a judgment at law, converts the interest into principal. Interest is, therefore, to be computed from that time forward upon the aggregate amount. (c) So that it may be regarded as a general rule, here as in England, that where a debt is liquidated by an auditor's statement confirmed, the whole carries interest from the date to which such confirmation relates; and so *toties quoties*, as any new statement may be made. (d) And if the debtor should appeal; and the judgment

(c) Bacon v. Clerk, 1 P. Will. 480; Brown v. Barkham, 1 P. Will. 653; Bickham v. Cross, 2 Ves. 471; Lloyd v. Williams, 2 Atk. 111; The Drapers' Company v. Davis, 2 Atk. 211; Wainwright v. Healy, 2 Dick. 444; Creuze v. Lowth, 4 Bro. C. C. 157, 318; Creuze v. Hunter, 2 Ves. jun. 165; Bell v. Free, 1 Swan. 90; Guant v. Taylor, 9 Cond. Cha. Rep. 47; Lamott v. Sterett, 1 H. & J. 47.—(d) Kelly v. Lord Bellew, 1 Bro. P. C. 202; Bradshaw v. Astley, 1 Bro. P. C. 565; Lloyd v. Baldwin, 1 Dick. 139; Bedford v. Coke, 1 Dick. 178; Pottenger v. Steuart, 3 H. & J. 356; Sloss v. McIlvane, ante 72; Craig v. Baker, ante 238; Tyson v. Hollingsworth, ante 333; Norwood v. Norwood, 9 June, 1800, post.

ATKINSON v. HALL.—This bill was filed on the 12th day of May, 1750, by George Atkinson surviving executor of Christopher Grindall, deceased, against John Hall. The bill stated, that the defendant being indebted to Grindall in the sum of £263 0s. 4d. sterling, on the 15th of August, 1746, to secure the payment thereof with interest, on the first of June then next, mortgaged to him certain tracts of land therein described; that the day of payment had elapsed, and that no part of the debt had been paid. Whereupon it was prayed, that the defendant might be decreed to pay the debt and interest due, and to grow due with costs, by a short day to be appointed by the court; or else be absolutely foreclosed from all manner of equity and redemption of the mortgaged premises; and that the plaintiff might have such other relief in the premises, as was usual in cases of this nature.

The defendant put in his answer, in which he admitted the execution of the mortgage; but alleged, that the lands were of much greater value than the debt and interest; that the mortgagee Grindall, in his life-time, committed great waste on the mortgaged premises, by cutting billets and handspikes, and destroying a warehouse of considerable value; and that the land was rented to several tenants, who were warned by the agent of Grindall, not to pay their rents to this defendant. And this defendant further alleged, that after being allowed for the waste committed and for the rents and profits, he was ready to submit to a decree, to bring the residue into court, &c.

To this answer the plaintiff put in a general replication; and a commission was issued to take testimony; which having been returned without any depositions being taken, it was afterwards ordered, by consent, that a commission be issued to audit accounts, relating to the matter in dispute between the parties. Whereupon

below should be affirmed, here as in England, the appellate court may, according to the express provisions, and the spirit of several

commissioners being named and struck, a commission in the usual form, (1 Bland 124, 465,) issued accordingly to James Maccubbin, Robert Swan, Thomas Sprigg, and William Chapman, who made the following report.

To his Excellency Horatio Sharpe, Esquire, Chancellor of Maryland. We humbly certify, that by virtue of a commission issued out of his Lordship's High Court of Chancery to us, and Thomas Sprigg, and William Chapman directed, to state, settle, audit, and adjust all accounts relating to the matter in dispute, in the said court, depending between George Atkinson, executor of Christopher Grindall, mariner, deceased, complainant, and John Hall defendant; we met at the house of Mrs. Catharine Jennings, in Annapolis, known by the sign of the Bunch of Grapes, on the 29th day of May instant; where the said John Hall, or any person for him, did not appear, although affidavit was legally made of his, the said John Hall's having had due notice of the time and place of meeting. And thereupon, the said George Atkinson, in his capacity as aforesaid, produced unto us a mortgage deed from the said John Hall, the defendant, to Christopher Grindall, in his life-time, dated the 15th day of August, 1746, which said mortgage appears to us to have been duly signed, acknowledged, and recorded, a copy whereof is hereunto annexed, whereby it appears to us, that there is now due on the same mortgage the principal sum of £263 0s. 4d. sterling, and for seven years and nine months interest to the date above mentioned, allowing the deduction for alteration of the style £122 5s. 9d. sterling, which, in the whole, amounts to £385 6s. 1d. sterling. All which is humbly submitted to your Excellency by J. Maccubbin, Rob. Swan.

29th October, 1755.—SHARPE, Chancellor.—It appearing by a report made by commissioners appointed to state and settle the accounts between the parties in this cause, there was due to the complainant's testator, on the twenty-ninth of May instant, the sum of £385 6s. 1d. sterling, for principal and interest upon the sum advanced on the said mortgaged premises; and that from the said 29th day of May until the 29th day of October, being the day of passing this decree, there is due to the complainant's testator the sum of £9 12s. 7d., being for five months interest on the aforementioned sum of £385 6s. 1d.; which, in the whole, amounts to £394 18s. 8d. It is, therefore, *Ordered*, adjudged, and decreed, that, in case the defendant doth not, on or before the 29th day of April next, pay unto the complainant the said sum of £394 18s. 8d. sterling, with lawful interest for the same, and also the costs expended by the complainant in this suit, the said defendant and all claiming by, from, or under him, shall be ever, and they are hereby from thenceforth, debarred and foreclosed of all manner of equity of redemption or reclaim, in and to the said mortgaged premises; and that the estate in the said premises be free and absolute of and from all redemption and equity, and power of redemption of, in, or by the said defendant, his heirs or assigns, or any person or persons claiming by, from, or under him or them.—*Chancery Proceedings, lib. S. R. No. 5, fol. 1236.*

PATTISON v. FRAZIER.—This bill was filed on the 23d of April, 1791, by James Pattison, one of the creditors of Alexander Frazier, late of Calvert county, deceased, in behalf of himself and the other creditors, against John Alexander Frazier. It alleges, that Alexander Frazier, deceased, was indebted to the plaintiff in the quantity of 108,000 lbs. of crop tobacco, and in the sum of £350 15s. 3d.; for the payment of which, with interest, he gave his bond on the 3d of January, 1788; and also in the further quantity of 12,940 lbs. of crop tobacco, and in the sum of £341 5s. 9d., on open account. And being so indebted to this plaintiff and to several

legislative enactments, add the interest which had accrued upon the judgment below to its aggregate amount, and direct the whole

others, he died in the month of June, 1790, intestate and without issue, leaving the defendant, an infant, to whom his real estate, consisting of a moiety of two adjoining parcels of land, containing about — acres, descended; which lands had been devised to him and this defendant, by their father, in the words following:

‘I give and bequeath all the lands that I am possessed of to be equally divided between my two sons, Alexander and John Alexander, to them and their heirs for ever; but, if in case either of my said sons should die without any heir lawfully begotten of his body, or before he arrives at the age of twenty-one years, that then in such case his part to be the sole right and property of my surviving son, his heirs and assigns, for ever. My will and desire is, that my son Alexander do, out of his part of my estate, expend so much money as will be sufficient to give my son John Alexander a good education. Whereas I have given all my land to my two sons, my will is, that the division line shall begin at Rake’s Land, and so running towards Fishing Creek; my son Alexander to have the first choice of the land. The residue and remainder of my personal estate I give to be equally divided between my two sons, their heirs and assigns, for ever. I constitute and appoint my loving son Alexander Frazier whole and sole executor of this my last will and testament.’

The bill further states, that Alexander Frazier was above the age of twenty-one at the time of his death; and, in virtue of the election given to him by this devise, did in his life-time, elect to have the southermost moiety of the land so devised, which he improved by erecting houses thereon, and repairing those already built, at considerable expense; that the personal estate of the said Alexander Frazier amounted to no more than £850 13s. 4d. as appeared by the inventory returned by the defendant John A. Frazier, who took out letters of administration on the same, and was therefore insufficient for the payment of his debts. Whereupon it was prayed, that John A. Frazier, being an infant, a guardian might be appointed for him to make answer; and that the real estate of Alexander Frazier, deceased, or so much thereof as might be necessary, might be sold for the payment of his debts.

The defendant John A. Frazier, on the 7th of May, 1792, filed his answer by his guardian *ad litem*, in which he admitted the death of his brother Alexander, as stated, and that the lands had been devised to him by their father, as set forth; but the interest which they thereby took, he submitted for decision; that by the will of their father, his brother was required to maintain and educate him; that his brother, after the death of their father, took possession of all his real and personal estate, and received the whole of the rents and profits thereof, which he applied to his own use; and maintained, but did not educate this defendant. Wherefore this defendant claims to be considered as a creditor of his brother, with a preference over others to the value of one-half of the rents and profits of their estate, and also to the value of the expense of the education which he ought to have obtained; that his brother erected no new houses on the land, but repaired some, as stated; that he made, in his life-time, no election to take the southermost half of the land, as stated; that his personal estate was wholly insufficient to pay his debts; that his brother became indebted by bond, as stated; but that, as to the open accounts, they were very confused; and he denied that his brother owed to the plaintiff so much as he demanded, and put him to establish his claim, &c.

A commission was issued, under which, testimony was taken and returned on the 4th of May, 1795. After which, the parties, the defendant having attained his full age, by their solicitors, on the 30th of November, 1795, entered into and filed an agreement in the following words:

to carry interest from the time of the affirmance until paid. (e) In England interest is allowed upon the whole amount of the debt,

‘This bill being filed for a sale of Alexander Frazier’s part of two tracts or parcels of land devised to him and his brother, the defendant, by the will of their father Alexander Frazier, by which said will Alexander Frazier, now deceased, had the right of election; and it being doubtful whether any election was made by Alexander Frazier, the son, in his life-time; and it being also doubtful whether this court can determine the fact of election, for the prevention of future controversy, it is agreed that the Chancellor, with the consent of the parties, shall decree a sale of the whole of the lands on a credit of three years, interest to be annually paid, and the bonds taken for the proceeds of the land to be equally divided between the creditors of Alexander Frazier and the defendant, each one-half, to be subject to the opinion and decree of the Chancellor as to the other points respecting preference among the creditors arising in the cause. That two trustees be appointed by the Chancellor to make sale of the land together, or in parcels, as may appear most advantageous; that the expense of one trustee be borne by the creditors, and of the other by the defendant; that one trustee be appointed on the recommendation of the creditors, and the other on the recommendation of the defendant. The sale to be on the premises.’ Upon which, persons being recommended to be appointed trustees by the parties respectively, the case was submitted.

30th November, 1795.—HANSON, Chancellor.—This case standing ready for decision on the agreement filed, the same, together with all other proceedings, were read and considered. Whereupon it is *Decreed*, that in conformity to the said agreement, all the lands devised to the defendant and his deceased brother, by his father, be sold, and that Henry Ridgely, of Annapolis, and Joseph Sprigg, of Calvert county, be, and they are hereby appointed trustees for selling the said lands; and that the course and manner of their proceedings be as follows: They shall lodge with the register of this court a bond or bonds, executed by themselves, and a surety or sureties approved by the Chancellor, in the penalty of £3,000, if one bond, or £1,500 each, if two bonds, conditioned for the faithful performance of the trust reposed in them, &c. They shall, at the same time, give the like notice to the creditors of Alexander Frazier, deceased, to exhibit the vouchers of their claims, &c. within six months from the time by them fixed for the sale, &c.

The trustees, on the 23d of May, 1796, reported that, after having given notice of the time and place of sale by publication in several newspapers, in the French and English languages, and by advertisement set up at several public places, they had, on the 12th of April, 1796, sold the whole land to Charles Williamson as the highest bidder, for £3 6s. per acre; and had taken his bonds, with Frisby Freeland and the defendant John A. Frazier as his sureties; which bonds they had returned as directed. This sale was afterwards absolutely confirmed.

(e) 3 Hen. 7, ch. 10; 19 Hen. 7, ch. 20; Kilty Rep. 228, 229; 1809, ch. 153, s. 4; 1811, ch. 161, s. 5; Welford v. Davidson; 4 Burr. 2127; Shepherd v. Mackreth, 2 H. Blac. 284; Frith v. Leroux, 2 T. R. 58; Furlonge v. Rucker, 4 Taunt. 250; Middleton v. Gill, 4 Taunt. 298; Gwyn v. Godby, 4 Taunt. 346; Anonymous, 4 Taunt. 876; Mitchel v. Miniken, 1 Com. Law Rep. 331; — v. Edmunds, 1 Com. Law Rep. 411; Burn v. Carvalho, 28 Com. Law Rep. 232; De Tastet v. Rucker, 4 Exch. Rep. 156; Tidd Pra. 1131; Howard v. Warfield, 4 H. & McH. 38; Contee v. Findley, 1 H. & J. 331; Butcher v. Norwood, 1 H. & J. 485; Gwynn v. Whitaker, 1 H. & J. 754; Pottenger v. Steuart, 3 H. & J. 360.

thus ascertained by a judgment at law, or an order in equity, although a large part of such amount should be constituted of

Sundry creditors of the deceased filed the vouchers of their claims, and, among others, the defendant, as the voucher of his claim, filed an account in the following words :

<i>‘ Alexander Frazier, deceased, to John A. Frazier,</i>		Dr.
1. To one-half of the profits of the estate, from the 9th of May, 1779, to 9th June, 1790, 11 years and 1 month, at £129 per year,	£1,429	15s. 0d.
2. To one-half of the price of timber sold by Alexander Frazier from the plantation, estimating the whole at £100,	50	0s. 0d.
3. To a charge on the estate for default of expending money in the education of John A. Frazier, as directed by the will of Alexander Frazier, deceased, say eight years at £40 per year,	320	0s. 0d.
	<u>£1,799</u>	<u>15s. 0d.</u>
<i>Contra.</i>		
1. By maintenance eight years, estimated at £20 a year,	£160	0s. 0d.
2. By clothing 11 years at £10 per year,	110	0s. 0d.
By balance due,	1,529	15s. 0d.
	<u>£1,799</u>	<u>15s. 0d.</u>

To balance per contra, £1,529 15s. 0d. to interest thereon 9th June, 1790.

E. E.

WM. KILTY, Solicitor for J. A. Frazier.

Explanation of the above account. The charge No. 1 arises from the will of Alexander Frazier, senior, leaving John A. Frazier the half of his estate; and the amount estimated from the testimony in the cause, particularly that of John Frazier. The charge No. 2 is deduced from the testimony respecting the sale of the timber, that not being considered as a part of the usual profits of the land. The charge No. 3 arises from the will of Alexander Frazier, senior, directing his son John A. Frazier to be educated out of Alexander Frazier's part of the estate, and the time during which his education was neglected is stated to be eight years, from the testimony which proves that he was educated about three years. The credit No. 1 is fixed at eight years, as it appears that John A. Frazier was boarded out about three years, which expense fell on Alexander Frazier as a part of his education. The credit No. 2 is given on an estimate formed from the testimony as to the manner in which John A. Frazier was clothed.'

After which, the case was brought before the court for further directions.

18th May, 1797.—HANSON, Chancellor.—Ordered, that the auditor state the claims of James Pattison against the said Alexander Frazier agreeably to the established principles of this court, and his own ideas, first giving notice to the defendant, or his solicitor, and to William Kilty, Esquire; and that having stated the said account he return it to this court, subject to be done with as to the Chancellor shall seem just.

In obedience to this order, the auditor reported, that from the exhibits filed by James Pattison, he had stated an account marked No. 1, on which there was due £3,992 2s. 7d. including interest to the 12th of April, 1796, the day on which the land was sold. That from the books of James Pattison, he had stated account No. 2, wherein the defendant was charged with what he actually appeared to have received, without paying any regard to the settlement made by the parties, and the bond given by the defendant. The balance in this account is only £2,379 19s. 8d

costs; (*f*) on which costs, as a separate claim, no interest would be allowed. (*g*) But here, as our acts of assembly have not made

including interest as aforesaid. That the difference in the accounts Nos. 1 and 2, arises from the complainant's turning the account into tobacco, when tobacco was very low, and from some charges in the proved accounts, which do not appear in the books exhibited to the auditor, and from some other small mistakes in their settlements.

To this report of the auditor, Jacob Pattison, the executor of the original plaintiff, excepted; 1st, for that the auditor hath only allowed the price of 30s. current money, per cwt. for tobacco, when the current price of that article, at this time, is from £3 to £3 10s. current money, per hundred. And inasmuch as the debt is due, and payable in tobacco, the rules of justice require that a full equivalent in money should be allowed on the same being commuted and changed into money; 2d, for that the same is erroneous and incorrect in the following particulars: 1, for that the auditor hath paid no regard to the settlement between James Pattison and Alexander Frazier, deceased, which took place on the 3d January, 1788, when the said Frazier gave the said Pattison his bond, as stated in account No. 1, and which said bond was a final adjustment between them of all out-standing transactions, and the same ought not to be unravelled, unless for errors; 2, for that the said auditor, in extending the tobacco, which is the real debt due, hath only allowed 30s. per hundred at this time, when the current price of tobacco is from £3 to £3 10s. per cwt.

28th November, 1797.—HANSON, *Chancellor*.—The Chancellor proceeded to consider the exceptions of James Pattison's executors to the report of the auditor, relative to the said Pattison's claim against the deceased.

The auditor has stated the account in two ways. In one he has charged the articles on each side, from the beginning, without regard to a bond for tobacco, given, as it is alleged, on a settlement of accounts between Pattison and Frazier, up to the date of the bond. In the other, he has begun with the said bond, and then added the subsequent articles.

It is material, perhaps, that no exception is taken on the part of the creditors in general, or of the heir. This being the case, and there being no allegation of fraud, or even error in taking the said bond, the Chancellor conceives that he cannot do otherwise than adopt that account in which Frazier is charged with the amount of the bond.

The exception relative to the price of tobacco appears to the Chancellor unreasonable. All sales, under decrees for the payment of debts, are directed to be made for money; and it has been the practice of this court to direct the auditor to state the claims of all creditors, exhibited to the Chancellor, up to the day of the sale of the property on credit, in order that the interest to be paid by the purchaser, and the interest due to the creditors, may run from the same day. There appeared to the Chancellor no other method of avoiding perplexity. Debts due in tobacco have always been reduced to money at the price tobacco bore on that day. For, if the money to arise from the sale were already deposited in court for the benefit of the creditors, they would receive just so much as the tobacco due to them would be then worth; and it were better for them to receive the money at once, than receive the tobacco, and have the trouble, expense, and risk of converting it into cash. Well,

(*f*) *Bodily v. Billamy*, 2 Burr. 1094; *Bickham v. Cross*, 2 Ves. 471; *De Tastet v. Rucker*, 4 Exch. Rep. 156.—(*g*) 14 Vin. Abr. 458; *Gordon v. Trail*, 3 Exch. Rep. 391.

the costs a part of that judgment debt upon which subsequent interest is to be computed until paid, no interest has been allowed

but as the money is not deposited, the claims are to bear interest, which is discharged with the interest paid by the purchaser.

This practice appears to the Chancellor unexceptionable. It is a principle of this court, that the amount of a claim here liquidated shall bear interest from the time of its liquidation. Is it not proper, then, that there be one day for the liquidation of all the claims against one estate? What day can be so proper as that from which the purchasers are chargeable with interest? Can it be conceived, that a tobacco debt is never to be liquidated until the money is brought into court? If that were the case, it would be impossible to ascertain the dividends of an insolvent estate until the money should be actually brought in. Would not great inconvenience be the result? Can it be conceived right, on any ground, that the value of the tobacco debt, which must at last be discharged in money, be subject to fluctuation until the time of actual payment? Is it not consistent with the spirit of this court, that one general rule should govern, so far as general rules can govern, all the cases of this kind, as well as of every other? And what general rule could be more just, with respect to tobacco claims, than the rule adopted, *viz.* that the day of sale shall be the day for adjusting the claims, the day to which interest shall be calculated, and on which the whole claim shall be consolidated with principal; the day on which the value of the tobacco, wheat, or other article, due from the deceased shall be inquired into? It is intimated that the commutation of money into tobacco is a fair speculation, &c. Suppose, then, that tobacco, since the day of sale, had fallen in price, would it appear just that the claim should be curtailed on that account, after it had been once ascertained?

On the whole, it appears to the Chancellor that the account No. 1, returned by the auditor, and not excepted against by the creditors or heir, allows the aforesaid executors as much as they can in reason claim. It is, therefore, adjudged and *Ordered*, that the said account be admitted, and that the exceptions of the said executors be overruled.

After which, the case was again brought before the court for further directions as to the claim of John A. Frazier.

28th December, 1798.—HANSON, *Chancellor*.—*Ordered*, that the Chancellor will, on the first day of March next, decide on the claim of John A. Frazier against the estate of Alexander Frazier; and that depositions, taken before any judge or justice, on two days notice, shall be received as evidence on hearing of the said claim. The objections against the said claim being made by James Pattison's executor, the parties to the dispute are considered to be Jacob Pattison, the said executor, and the said John A. Frazier.

Without taking any testimony under this order, the claim was afterwards brought before the court upon the proceedings and proofs in the case.

13th August, 1799.—HANSON, *Chancellor*.—This is an account drawn up by the claimant's solicitor, and not sworn to by the claimant, as unquestionably it ought to have been, if it was expected to be passed. His death has now made it impossible to have such an oath, and the solicitor relies on the testimony obtained on a commission between James Pattison and the said claimant, which issued for a purpose very different from that of trying the justice of this claim. The Chancellor heretofore delayed his decision, in order that the persons interested against the claim might have an opportunity of obtaining proofs; but no evidence hath been since obtained

to a creditor upon his costs ; although the trustee of the court always has a due proportion of interest awarded to him on the

on either side, and he is called upon to determine on the papers which had before been filed.

With respect to the first charge in the account, viz : for the annual profits of the claimant's part of the estate, the Chancellor does not perceive the proof by which the precise amount is ascertained. But supposing it ascertained ; it is then to be considered, whether or not the annual profits of the six years, between the death of Alexander Frazier and the sale of the land, during which it was enjoyed by the claimant, may be charged against him.

The act which gives to this court authority to sell, &c., leaves the debts to be satisfied entirely to the discretion of the Chancellor. He has, indeed, established, that all just debts, except those which were a lien on the lands during the life of the deceased, shall be on an equal footing. But this does not prevent him from rejecting a claim, if any circumstance has taken place since the death of the deceased, which renders it unconscientious or unfair to prefer the claim. It is certain, that if John A. Frazier did not come in as a creditor, the other creditors would not be entitled to an account from him of the profits since his brother's death ; but when he prefers a claim against his brother's estate, nothing appears more reasonable, than that he should give credit for the profits he has received from that estate. In short, it is the opinion of the Chancellor, that the claimant is entitled to an account of profits for only about three years ; the difference between the time of Alexander's holding John's part, and the time of John's holding Alexander's part. It is worthy of remark, that the act for the amendment of the law, 1785, ch. 80, s. 7, obliges heirs to apply the real estate agreeably to the rules prescribed for executors and administrators. In a contest, then, between the creditors in general, as in the present case, and the heir of the deceased claiming as a creditor, how is it possible to say otherwise than that his just claim is no more than the balance remaining, after giving credit for the profits of that real estate ?

The second charge may be right. The third charge is for the deficiency of money expended in the claimant's education. By the bye, if Alexander was chargeable with his education, he ought to have charged the full amount, and to have given credit for the actual expenditure, instead of charging only deficiency and giving credit besides. This charge is founded on the complainant's construction of his father's will.

Now, supposing it be the intent of the will to charge Alexander with his brother's education and maintenance, the strangest words imaginable are used. It is not, 'I give Alexander one-half of my estate on condition, that he lays out the sum of — in the complete education and maintenance of his brother, at some approved school,' or, 'I will, that the part of my estate devised to Alexander be charged with the expense of providing a good education to his brother, and likewise completely maintaining him at some approved school.' No ! it is, 'my will and desire is, that my son Alexander do, *out of his part of the estate*, expend so much money as will be sufficient to give my son John Alexander a good education.' It is apparent, from the whole will, setting aside this disputed part, that the testator contemplated perfect equality between his two sons ; except, that he gave Alexander, the eldest, choice of two equal parts, and makes him executor ; which is just what was reasonable, &c. Now, by changing the disposition of the words, and putting '*out of his part of the estate*,' at the end of the clause, it stands perfectly consistent with that intended equality ; and it is well observed by the counsel, that transpositions are frequently made for the purpose of supporting a rational construction of the whole.

amount allowed to him as commission by the order confirming the auditor's report. (*h*)

It may be observed, that there are few men, who, in speaking or writing, do not express themselves in such a manner that, if you understand them according to the strict rules of grammar, you make them speak contrary to their intention.

It is alleged, without proof, that Alexander was burthened with the education of his brother on account of his, the said Alexander's, having already received a good education; and that by so charging him, equality was preserved. But it is not so. In such a case, the eldest son would be educated at the charge of the whole estate, and the younger at the charge of the elder's part. For illustration, suppose the whole estate to be £4,000; and that £500 had been expended in educating Alexander more than had been expended on John. To make them equal, it ought to be directed that £500 shall be expended on John, and the residue divided between them. In that case, they will have been educated at equal expense, and the share of each will be £1,750. But, according to the construction contended for, they will have been educated at equal expense, and John will get £500 more than his brother; that is, they each share £2,000 out of the £4,000. John has his part clear; but £500 is taken from Alexander to educate and maintain John. When the contemplation of equality is so apparent; when an easy, obvious transposition will support that equality; and when, without the transposition, such inequality takes place, it is impossible to admit the claimant's construction of the will. 'My will and desire is, that my son Alexander, out of his part of the estate, shall expend so much money,' &c., as already has been observed, is strange language to constitute a charge on Alexander's part. 'My will and desire,' are words very significant; 'to expend so much money,' are equally so. In short, the meaning of the whole clause was, that Alexander, the executor, should be authorized to lay out as much of John's part of the personal estate as would suffice to give him a liberal education. Without this provision in the will, John's education might be defective. The guardian, whom he might choose, or who might be appointed, without the provision, might not think proper to expend so much money as might suffice; particularly, if the annual profits should not correspond with the proofs in the cause, or might happen, in some years, to fall short.

In addition to all this; supposing us compelled to take *his* for Alexander's, it may be asked whether good education *must* comprehend maintenance; or whether, to prevent the great inequality in favour of a younger son, education might not mean barely the price of tuition, books, &c. lodging, food, and clothing, must be had whether at school or at home; and, therefore, it might be said, that he who is charged with education is not, of course, charged with those articles of necessity. In construing a will, it is notorious, that the judges have never considered the question as a mere point of grammar. The question ever is, 'what was the intent of the testator,' to be collected from the whole of his words. Amongst grammarians, there is no doubt, that *his* is considered, in propriety, as referring to the antecedent, if there be one, and not to a subsequent. It may, indeed, in this case, be contended, that the testator was not aware of any antecedent, or any rule of grammar. It is probable, that he was no grammarian. Let it just be supposed, that he had appointed *two* executors; and had said 'my will and desire is, that *my* executors, instead of saying *my son Alexander*, do, out of *his* part of my estate, expend, &c. &c. Is there even a rigid grammarian, who would say, that the testator violated the rules of grammar.

This judicial conversion of the interest into principal, has, in some respects, the appearance of allowing compound interest,

No! he would say 'his' refers the antecedent, if there be one; but the word *his* may well be placed so as to refer to a subsequent, as in the case of Mr. Frazier's directing his two executors out of his part of the estate, to educate his son John Alexander. From the proofs in the cause, and from reasonable suppositions, the account may stand as follows:

<i>A. Frazier, deceased, to John A. Frazier,</i>		<i>Dr.</i>
To one-half of the gross profits of the estate, from 9th May, 1779,		
to June 1790, 11 years 1 month, at £129 per ann.	£1,429	15s. 0d.
To timber from my part, or one-half of the timber sold, ...	50	0s. 0d.
	<u>£1,479</u>	<u>15s. 0d.</u>

Contra.

By one-half of the gross profits of the estate for 6 years, at the rate aforesaid, ...	£774	0s. 0d.
By one-half of taxes, medicines, repairs, &c. &c. for 5 years, 1 month; that being the difference between the time of Alexander's holding the estate, and John's holding the estate, the repairs, being made chiefly by Alexander, at £24 per ann. . . .	122	0s. 0d.
By board, clothing, education, pocket money, physic, &c. for 8 years, at £45 per ann.	360	0s. 0d.
By one-half of the gross profits of the estate, from the arrival at age of John to Alexander's death. It is not to be supposed, that if Alexander held the estate, after his brother's full age, he had less than one-half. The defect of proof must again be remarked. But say only £75 per ann. for 3 years, after John arrived at age, and was entitled to his estate, ...	225	0s. 0d.
	<u>£1,481</u>	<u>0s. 0d.</u>
By balance in favour of Alexander, ...	1	5s. 0d.

On the whole, from the fullest investigation of this case; and on full deliberation, it does not appear to the Chancellor, that John A. Frazier's legal representatives have any just claim against the estate of Alexander Frazier. The Chancellor hath declared himself thus fully; because the grounds of his decision could not be obvious; and because he wishes, on every occasion, if possible, to reconcile to the losing party his determinations. There are, indeed, circumstances in this case, which required that he should explain himself; in order that one principle, at least, should be known to be established; (3 H. & J. 144, note.)

On the 2d of October, 1799, the auditor reported, that he had stated the claims exhibited against the estate of Alexander Frazier, deceased, amounting, on the 12th day of April, 1796, to £5,274 18s. 0d. including the claims of James Pattison, as heretofore stated and returned as account No. 1. And on those claims, he remarks, that Nos. 11, 13 and 15, are not proved; that Nos. 16 and 17 are proved, with an exception to allow any account standing against them on the deceased's books; that No. 12 is only a copy of a receipt exhibited as money paid to the said Alexander Frazier as attorney; but not proved by the claimant; and that No. 14 is a note of hand, given to Richard Ward, and proved by Zachariah Ward, who does not even state, that he is executor or administrator of Richard; the probate is also deficient.

The purchaser, Charles Williamson, by his petition, stated, that, under a persua-

and of being in fact usurious; but it is not so. (i) Compound interest is the annual or periodical conversion of interest into prin-

sion that John A. Frazier was entitled to half the purchase money, he had accordingly paid him that amount, and obtained his receipt; whereupon, he prayed that he might be allowed a credit for so much upon his bond.

After which, and upon all the foregoing matters, the case was again brought before the Chancellor for further and general directions.

23d May, 1800.—HANSON, *Chancellor*.—Let the auditor, at the request of the purchaser, state the proportion of each creditor, reserving the amount of claims not established. The Chancellor, on application, at any time after the 10th of July next, will decide on any claim against the estate of Alexander Frazier, which has not yet been passed; provided a copy of this order be inserted in the Maryland Gazette three times before the 15th of June next. Depositions taken before a single magistrate will be received as evidence of any of the claims aforesaid. The rules prescribed by the Orphans Court, with respect to claims against deceased persons, are adopted in the Chancery Court; claims passed by an Orphans Court are generally passed by the Chancellor, unless the same are disputed.

In obedience to this order, the auditor, on the 4th of November, 1800, reported that he had stated the claims exhibited against the estate of Alexander Frazier, deceased, and the dividend on each claim, amounting to £1,405 12s. 3d. the one-half of the purchase money due them on the 12th day of April, 1796; that No. 11 was not proved; No. 12 was a copy of receipts, and not proved, only as being true copies of the receipts; No. 13 was not proved; No. 14 was a note to Richard Ward, proved by Zachariah Ward, who said he had not received any part, but had not said that he was either the executor or administrator; and No. 16 was proved, with an exception to allow any account against it on the deceased's books. Upon which the case was again submitted to the Chancellor.

2d December, 1800.—HANSON, *Chancellor*.—The Chancellor has examined the auditor's last statement of claims, and the dividends by him struck. He is of opinion that the auditor has done right in rejecting claims Nos. 11, 12, 13, 14, and 16. But as there is a probability, that the said claims, or some of them, may be hereafter established, he will not absolutely dismiss them without notice to the claimants to produce further vouchers.

Ordered, therefore, that the Chancellor will, on application of any person concerned, proceed immediately to decide on any of the following claims against the estate of the said Alexander Frazier, *viz.* William Campbell's, Robert Ward's executor, Walter Roe's, Richard Ward's, and Robert McCoy's; provided it shall be proved to his satisfaction, if a copy of this order hath been served on the claimant fifteen days before such application.

Ordered, further, that of the money to arise from the sale of the said Frazier's real estate, there be paid, agreeably to the auditor's statement, as follows:

To the trustees, for commissions, ...	£ 90 0s.0d.
For costs of suit as taxed, ...	20 8 6
To the auditor, for fees, ...	8 15 0
John A. Frazier's representatives, ...	1,405 12 3
James Pattison's representative, ...	1,067 19 5½
Richard Frazier, ...	17 8 0

(i) *Chambers v. Goldwin*, 9 Ves. 271; May, 1751, ch. 17, s. 2 and 3.

cipal, so that the whole may carry interest to the end of the next year or period, and so on. The contracting for which originally would be deemed illegal. (*j*) But where the interest is converted into principal by a judgment at common law, or by an order of this court, it is because of the whole being found to be then due as an entire debt, which is so judicially required to be paid, on which, if the debtor fails to pay as commanded, he must, thenceforward, be charged with interest upon the whole amount so adjudged to be due. (*k*) And upon similar principles, on a bill to foreclose, or redeem a mortgage, if, by the decree, the mortgagor is allowed a certain time to redeem, by the payment of principal, interest and costs down to a specified day; and if he fails to do so, the interest will be added to the principal, and the whole will, thenceforward bear interest. (*l*)

George Mann's representative, ...	£ 34 19s. 3d.
Benjamin Harwood, ...	31 18 3
Ditto, ...	91 16 6½
Ditto, ...	3 8 7
William Sinclair, ...	20 3 8
Daniel Ross, ...	9 7 3
Wallace & Muir, ...	5 7 6½
James, ...	34 5 8
James Murray, ...	2 1 0

Ordered, further, for the accommodation of all parties concerned, that the receipt in writing of any person, entitled as aforesaid, filed in this court for so much money as is due to the said person, shall be admitted, and considered as so much money brought into court, agreeably to the directions of the decree in this cause; provided the said receipt be filed by the trustees, or either of them.

N. B. It is not the Chancellor's meaning, that the whole of this order be served on those claimants whose claims are doubtful. It will be sufficient to serve only the clause relating immediately to them, and the preceding part. The Chancellor has been often embarrassed, and great delay and trouble in the settlement of cases like the present, has resulted from the neglect of claimants to exhibit, in the first instance, proper vouchers; and from his own unwillingness to reject claims which the parties probably have it in their power to establish; and from the obvious impossibility of his distinguishing, in the beginning, between inattention, ignorance, and sheer speculation. The present case has been long delayed on account of such claimants. Should any of the aforesaid doubtful claims be finally rejected, there will be another dividend to be struck. That a final settlement may be had as soon as possible, he recommends the immediate service of the order as aforesaid.—M. S.

(*j*) *Neal v. The Attorney-General*, Mosely 247; *Bosanquett v. Dashwood*, Ca. Tem. Tal. 40; *Chambers v. Goldwin*, 9 Ves. 271; *Howard v. Harris*, 1 Vern. 194; *Sackett v. Bassett*, 4 Mad. 64.—(*k*) *Shepherd v. Mackreth*, 2 H. Blac. 284; *Bickham v. Cross*, 2 Ves. 471; *Creuze v. Lowth*, 4 Bro. C. C. 318, 158.—(*l*) *Bickham v. Cross*, 2 Ves. 471; *Harris v. Harris*, 3 Atk. 722; *Creuze v. Hunter*, 2 Ves. jun. 158; *Atkinson v. Hall*, ante 371.

Interest is always allowed on debts secured by a mortgage; and where an account is stated, with the knowledge of the mortgagor, and the whole amount, principal and interest, is paid by an assignee of the mortgagee, with the assent of the mortgagor; such aggregate amount of principal and interest, shall bear interest in favour of the assignee. And so too, where the principal and interest has been paid by a surety, he shall have interest upon the whole. (m) Such a conversion of interest into principal in favour of an assignee of a mortgagee, a surety, and the like, is founded upon an express, or implied contract between the parties, as to a separate or single transaction; and is not considered illegal, as it would be, if done under an original contracting, for the compounding of interest, or for a periodical conversion of the interest into principal. (n)

On a bill for an account and the like, by a creditor to obtain payment from his debtor; or on a bill to recover a legacy, the subsequent interest is computed, not upon the aggregate amount found due at the time of the decree; but on the principal only, from the time the debt was liquidated, or became payable until it is paid or brought into court. (o) The rule for computing interest, in all cases, where the debt carries interest; and the debtor has made partial payments, is, that the interest is calculated from the time the debt became payable, down to the day of the first payment: and the interest is added to the principal, then the payment is deducted from the whole; and if such payment satisfies the whole interest and a part of the principal, then the interest is calculated upon the balance of the principal to the day of the second payment, from the whole of which the second payment is deducted, &c. But if the first payment does not discharge the whole interest, then after applying it to the satisfaction of so much of the interest, the interest is calculated upon the principal only, until the day of the second payment, which is deducted from the whole amount, and so on. So that in no way is any interest calculated and paid upon interest. (p)

But where the estate of the deceased, or insolvent debtor is in-

(m) *Powel Mortg.* 903, 905; 2 *Fonb.* 438.—(n) *Ossulston v. Yarmouth*, 2 *Salk.* 449; *Perkyns v. Baynton*, 1 *Bro. C. C.* 574; *Ex parte Bevan*, 9 *Ves.* 224; *Chambers v. Goldwin*, 9 *Ves.* 271; *Caliot v. Walker*, 2 *Anstr.* 495; *Eaton v. Bell*, 7 *Com. Law Rep.* 14.—(o) *Butler v. Duncomb*, 1 *P. Will.* 453; *Bickham v. Cross*, 2 *Ves.* 471; *Perkyns v. Baynton*, 1 *Bro. C. C.* 574; *Creuze v. Lowth*, 4 *Bro. C. C.* 153, 318; *Turner v. Turner*, 1 *Jac. & Walk.* 47; *Parker v. Mackall*, ante 63; *Woodward v. Chapman*, ante 71; *Sloss v. McIlvane*, ante 73; *Craig v. Baker*, ante 235.—(p) *Frazier v. Hyland*, 1 *H. & J.* 98; *Gwinn v. Whitaker*, 1 *H. & J.* 754.

sufficient to pay his debts; the personal credit having ceased, and all hope of obtaining payment, by the personal exertions of the debtor, having come to an end, the estate, as in cases of bankruptcy in England, is treated as a dead fund, as a kind of shipwreck, in which there can only be a salvage of a part to each creditor. (q) Under such circumstances, it has long been the practice of this court, as the best method of settling the proportions among the creditors, to have a statement made by the auditor, of the aggregate amount of the principal and interest of their respective claims, as of the day of the sale of the real estate, which, when confirmed, operates as a judgment in favour of each from that day. And, as, in all cases, where the estate is sold on a credit, the purchase money is made to bear interest from the day of sale; the aggregate amount, thus found due to each creditor, is that amount upon which a proportional dividend of the proceeds of the estate is to be awarded to each, with a similar proportion of the interest which may be paid on the purchase money. So that, where the creditors of an insufficient estate, have been delayed by a sale for their satisfaction on a credit, they may have the interest, on the dividends of their respective claims, met and reimbursed by the interest arising from the purchase money of the estate sold. (r)

If any one of the creditors has received a part of his claim from the estate of the debtor, he cannot be allowed to obtain any thing more, until the other creditors have received satisfaction in the same proportion; (s) but a mortgage creditor, after having exhausted the mortgaged estate by a sale, may come in against the other estate of his debtor for the deficiency, *pari passu* with the other creditors. (t) This, however, does not extend so far as to compel any creditor to bring back into hotchpot any payment he may have fairly received. (u) An heir or devisee was allowed formerly to retain, for the same reason, that an executor or administrator was allowed to retain an amount equivalent to the satisfaction of his debt, in preference to others. (w) But as it has been declared, that the claim of an executor or administrator shall only

(q) *Ex parte Bennet*, 2 Atk. 527.—(r) *Jacob v. Suffolk*, Mosely 27; *Neal v. The Attorney-General*, Mosely 247; *Corrie v. Clarke*, 1 Bland, 86, note; *Dorsey v. Hammond*, 1 Bland, 468; *Tyson v. Hollingworth*, ante 333; *Pattison v. Frazier*, ante 372.—(s) *Sheppard v. Kent*, 2 Vern. 435; *The case of Sir Charles Cox*, 3 P. Will. 344, n.; *Shiphard v. Lutwidge*, 8 Ves. 29; *Jennings v. Elster*, 7 Cond. Cha. Rep. 115.—(t) *Tooke v. Hartley*, 2 Bro. C. C. 126; *Shiphard v. Lutwidge*, 8 Ves. 29.—(u) *Lowthian v. Hasel*, 4 Bro. C. C. 168.—(w) *Loomes v. Stotherd*, 1 Cond. Cha. Rep. 235; *Nunn v. Barlow*, 1 Cond. Cha. Rep. 301.

stand on an equal footing with other claims of the same nature; (x) and as it had been previously declared, that an heir or devisee should pursue the same rules in the payment of debts out of the real assets as were prescribed for an executor or administrator; (y) it would seem to follow, that the claim of an heir or devisee should now, in like manner, be held to stand only upon an equal footing with all other claims of the same nature; and be allowed to retain only for a due proportion. (z)

Here, however, it may be well to observe, that although it is directed, by an act of assembly, that all judgments against the deceased shall be first discharged, if the assets be sufficient; but if not, and there be more judgments than one, a proportionable division of the assets shall be made among them, in affirmance of the common law, as to the personalty, (a) and then, it is further declared, by the same act of assembly, that, in case there be not personal estate sufficient, the heir or devisee shall pursue the rules and directions aforesaid, in the payment of the debts of the deceased; and that all courts of law and equity shall observe those rules and directions. (b) Yet as nothing is said, in that legislative enactment, as to any lien upon the real or personal estate; and, as it would be impracticable, in many cases, to satisfy judgments in due proportion only; and at the same time sustain the liens of mortgages and vendors, it has been always held, that notwithstanding what is said in that act of assembly, all liens upon the realty must remain in full force; and that the rules therein laid down can only apply where no such lien exists on the personal estate by a *fiери facias* actually delivered to the sheriff; or on the real estate by a mortgage or judgment made or recovered in the life-time of the deceased. (c) And, consequently, since the real estate of a debtor, has been made liable to the payment of his debts by statute; and can only be properly applied in payment of them, after his death, in a court of equity, that estate can only be regarded as *legal assets*, not having been raised where there were none before; and, therefore, must be administered accordingly, subject to all the legal and equitable liens, preferences and priorities of those creditors who may be entitled to obtain satisfaction from them. (d) That is, they must be first applied in discharge of all costs, so as thus to

(x) 1798, ch. 101; sub ch. 8, s. 19.—(y) 1785, ch. 80, s. 7.—(z) *Player v. Foxhall*, 1 Russ. 538; *Winter v. Hicks*, 5 Cond. Cha. Rep. 490.—(a) Will. Exrs. 660.—(b) 1785, ch. 80, s. 7.—(c) *Tyson v. Hollingsworth*, ante 333; *Pattison v. Frazier*, ante 372—(d) 2 Fonb. 403; *Silk v. Prime*, 1 Bro. C. C. 139.

make the creditors contribute in due proportion to the expense of the suit; (e) next in the payment of the public dues, taxes and levies; then in discharge of each mortgage, equitable lien, (f) and judgment according to its respective priority; recollecting, that the lien and priority of a mortgage is confined to the principal sum particularly mentioned and expressed, to be secured thereby; (g) and after that in payment of the creditors in due proportion; to the satisfaction of all which the real estate has been made alike liable, by statute, without preference. (h)

No man can be compelled to institute a suit for the recovery or establishment of his rights; because, as to the disposition of his own peculiar rights and property, his will stands for a law. But no one can be permitted either to use, or to neglect to use, his rights to the prejudice of others. Hence, if a prior mortgagee attempts to use his incumbrance as a protection of the property of his debtor, it will be deemed a fraud upon the other creditors; and his lien will be postponed until the injured and junior incumbrances have been satisfied. And so, too, where a creditor has a lien upon a particular fund, which has been previously mortgaged or incumbered, he may come here and redeem the property from such prior incumbrance, so as not to permit him to neglect to establish and receive his debt to the prejudice of others, who have an interest in the proper application of the surplus. (i) The personal estate of a deceased debtor must be first applied in payment of his debts, and then distributed among his next of kin or legatees; and where his personal estate is insufficient to pay his debts, a right accrues to all his general creditors to have his real assets administered in equity for their benefit, because of their having a lien upon them, as against his heirs and devisees, arising from the statute which subjects real estate to the payment of debts, (j) which they have no other way of making available than in a court of equity. (k) And, therefore, a next of kin, legatee, heir, or devisee, having an interest therein, has a right to redeem any outstanding incumbrance upon those assets; or, in other words, to bring all who have a prior, or equal claim, upon them here as parties, to have their rights adjusted and satisfied, so as to clear the

(e) *Loomes v. Stotherd*, 1 Cond. Cha. Rep. 236; *White v. Peterborough*, 4 Cond. Cha. Rep. 185; *Dorsey v. Hammond*, 1 Bland, 468.—(f) *White v. Casanave*, 1 H. & J. 106.—(g) 1825, ch. 50.—(h) 7 Geo. 2, C. 7.—(i) *Powel Mortg.* 281, 610.—(j) *Martin v. Martin*, 1 Ves. 214; *Chalmer v. Bradley*, 1 Jac. & Wal. 59.—(k) *Hindman v. Clayton*, ante 337.

estate, that the surplus may be distributed among the next of kin, legatees, heirs, or devisees, of the deceased. (*l*)

Hence, although it is clear that a creditor cannot be deprived of any lien he may hold upon property in a suit to which he is not a party; (*m*) yet, if he should attempt to proceed upon his lien to

(*l*) *Francklyn v. Fern*, Barnard. Rep. 30; *Brooks v. Reynolds*, 1 Bro. C. C. 183; *Perry v. Phelps*, 10 Ves. 39; *Greig v. Somerville*, 4 Cond. Cha. Rep. 453; *Shewn v. Vanderhorst*, 4 Cond. Cha. Rep. 458.

ANDERSON v. ANDERSON.—This bill, filed on the 20th of November, 1788, states that the late Rebecca Anderson, by her will, gave to the plaintiffs certain legacies, and charged the payment of them upon her real estate, which she devised to James Anderson; that the testatrix was indebted by bond to Alexander Christie, and jointly bound with Ann Ogle to pay a composition of 6s. 8d. in the pound to the creditors of the said James Anderson, the devisee; that one of the legatees was dead, to whose legacy the plaintiffs were entitled as next of kin; that another legatee was dead, who, by his will, had given his legacy to one of these plaintiffs, and that a third legatee having married and died without issue, letters of administration had been granted to one of these plaintiffs; that the testatrix Rebecca Anderson left no personal estate, and that the devisee James Anderson had died leaving a daughter, the infant defendant, his sole heir. Whereupon it was prayed that the real estate so devised, might be sold, in the first place, to satisfy the debts of the testatrix Rebecca; and in the next place, the legacies given by her, and also the debts due by James Anderson, deceased, the devisee.

The infant defendant answered by her guardian *ad litem*, admitting the allegations of the bill, and alleged that Ann Ogle had paid the composition to the creditors of James Anderson, and having obtained an assignment of their claims against the estate of the testatrix, she, Ann Ogle, claimed contribution.

17th April, 1789.—*ROGERS, Chancellor*.—Decreed, that the real estate of Rebecca Anderson be sold, &c.; that James Hindman, the trustee, shall, on his receipt of the purchase money, first pay and satisfy to the said Alexander Christie, the said sum of £300 sterling, and interest of five per centum thereon from the date of the said bond, in current money, at sixty-six and two-thirds per cent. exchange. And to the said Ann Ogle one moiety of the said composition of 6s. 8d. in the pound of the debts of the said James Anderson, due and owing in London, and now assigned to the said Ann Ogle, the said moiety amounting to the sum of £2,464 15s. 4½d. sterling, with interest thereon of five per centum from the 8th day of August, in the year of our Lord one thousand seven hundred and seventy-four, in current money, at sixty-six and two-thirds per cent. exchange; and out of the residue of the money arising from such sale, pay the said legacies to the aforesaid persons respectively entitled to receive the same devised by the last will and testament of the said Rebecca Anderson to her daughter, and Harriet Rebecca, and her son William Anderson, with interest on the same of five per cent. respectively, from the first day of February, in the year seventeen hundred and seventy-six, in current money, at sixty-six and two-thirds per cent. exchange; and the surplus of the money arising from such sale, to pay and apply to the satisfaction and discharge of the debts due and owing from the said James Anderson, deceased, which there shall not be personal assets of the said James Anderson, in the hands of the said trustee, as his administrator, to discharge; a commission of four per cent. allowed to the trustee. The personal estate to be first applied before any of the said proceeds of sale, &c.—*Chancery Proceedings, lib. S. H. H. lett. B. fol. 620.*

(*m*) *Jones v. Jones*, 1 Bland, 452.

enforce payment, and thus to obstruct or pervert the administration of the assets, after a decree to account for that purpose, he may be enjoined, and so compelled, to come here to obtain satisfaction; (n) first, however, deducting the costs of the suit here, which has been thus made to enure to his benefit, from the fund brought in, and which may be thus exhausted by his lien. (o) But, where the claim of a creditor, who voluntarily comes in under the decree, is contested, the costs of such contest are not charged upon the estate to the prejudice of other creditors. (p) If a mortgagee, a vendor, holding an equitable lien, or a judgment creditor, having a general lien, fails or refuses to come in, the property may be sold subject to his lien, leaving it unimpaired; so that he may have the same remedy against the estate as before the decree and sale. (q) But, although such a creditor cannot be compelled, merely on the usual notice to creditors, to come in and receive satisfaction in discharge of his lien, yet, any other creditor, upon the general principles of the court in the administration of assets, may, by an original, amended, or supplemental bill, make him a party to a creditor's suit, so as to have his incumbrance cleared away, and the surplus applied for the benefit of the general creditors. (r) And this may be done, not only at the instance of any one who is then an actual creditor of the deceased, but by one who, from the peril in which he stands, as executor, administrator, or surety, has a right to be substituted for, and to take the place of an actual creditor. As where certain property was charged by will with the payment of a particular debt, which the devisee, taking under the will, failed to pay, the executor of the deviser was allowed, by a bill *quia timet*, to compel the devisee to pay in order to save the personalty of the deviser; (s) or where a judgment had been obtained against the surety on a bond, such surety, before he had paid any part of the debt, was permitted to file a bill against the representatives of the deceased, and to have the realty sold for the satisfaction of his principal's debt to save himself harmless. (t)

(n) *Sumner v. Kelly*, 2 Scho. & Lefr. 398.—(o) *Kenebel v. Scrafton*, 13 Ves. 370; *Bluett v. Jessop*, 4 Cond. Cha. Rep. 112; *Winter v. Hicks*, 5 Cond. Cha. Rep. 490.—(p) *Abell v. Screech*, 10 Ves. 356; *Watkins v. Maule*, 4 Cond. Cha. Rep. 45; *Young v. Everest*, 4 Cond. Cha. Rep. 499; *Rowland v. Tucker*, 4 Cond. Cha. Rep. 591.—(q) *Barrett v. Blake*, 2 Ball. & Bea. 354.—(r) *Greenwood v. Taylor*, 4 Cond. Cha. Rep. 381; 2 Mad. Chan. 657; *Millar v. Baker*, 1 Bland, 147, note.—(s) *Pue v. Dorsey*, 1 Bland, 139, note.—(t) *Howard v. Harris*, 1 Vern. 193; *Antrobus v. Davidson*, 3 Merival, 570; *Arthur v. The Attorney General*, ante 246.

In the case under consideration, it is clear, that the creditors of the late *Philip Hammond* could only obtain satisfaction from his real estate in the manner in which his will directs; and that they could only enforce payment in that mode by a bill to which the heirs, devisees, and executors, were parties; because, by the will a sufficiency of assets for the payment of all the debts of the testator have been lawfully passed into their hands. But the devisees and legatees, under the will of *Philip Hammond*, deceased, take an estate or interest which they have a right to have disencumbered and protected from the charge imposed upon it, either by means of the funds placed in the hands of his executors for that purpose, or that the incumbrance should be adjusted and reduced to its proper proportions, and lowest amount, by a contribution from all the devisees charged with contribution. In this respect, these devisees stand in the condition of junior mortgagees, or simple contract creditors, who have a right to redeem, or to have all superior incumbrances satisfied and removed, so as to give them the full benefit of the surplus. But, from the manner in which they take and hold, they have no means of ascertaining whether there are, in fact, any creditors or not; or if there are any, who they are, and the amount due to each, which has been left unpaid out of the fund set apart by the testator for their satisfaction. Unless they are permitted to have their complaint for all these purposes considered and treated as a creditor's suit, and the creditors of the testator notified to come in, establish their claims, and receive satisfaction, they can, in no way, disengage their respective portions from the incumbrance charged upon it; the cloud that has been thus suspended over them may long remain, or, at some future day, burst upon them to their ruin.

The next difficulty is, as to the proportions in which these devisees are to contribute. It has been contended, that the testator having given to each one of them what he, at least, considered as portions of equal value, must therefore have intended that they should contribute share and share alike. But I understand the testator differently.

As I have before remarked, it is perfectly evident that the testator had adjusted the divisions and distribution of his estate with great deliberation and care; and by the very act of setting apart a separate fund for the payment of his debts, he strongly indicated an intention, that the relative value of the divisions he had made, should not be disturbed. The language used in the codicils, giv-

ing the sums of money to *Charles* and *Harriet*, shews that by placing those sums in lieu of the negroes he had disposed of, he meant to restore, so far, that previously adjusted apportionment, which he himself had interfered with. But this is not all; for, as if determined that even his creditors, whose rights he knew he could not absolutely control, should not break down the equilibrium which he had established among those objects of his bounty, by taking from one more than from another, he declares, that in case the fund set apart for the satisfaction of his creditors should not be sufficient, that then 'my executors pay the balance of my debts from my estate generally, and from the rents and profits; and I request and will that they give bond for their payment, and that no administration on my estate be had in the ordinary manner, but that the property devised to my sons and daughters, and my grandson, shall contribute in equal proportion to the discharge of my debts;' that is, in equal proportion, having regard to the actual value of each portion so charged. That this was his intention is clear, from another view of the matter. It must be admitted, that the testator meant, in all events, to give something to each one of those devisees; but if their portions were of unequal value, as they are admitted to be, and they were notwithstanding to contribute share and share alike, then it is clear that if the amount of debts were large, the portion of one might be wholly exhausted, and he might ultimately get nothing, and yet leave a large donation to the others. I am therefore of opinion, that the contribution must be in due proportion to the actual relative value of the whole property given to each one of these devisees. (u)

But to adjust this proportion, the principal of the sums of money given to *Charles* and *Harriet* must be taken into the estimate as parcels of their respective portions; and after those sums, principal and interest, have been charged against the executors who received the assets, and first taken from the fund set apart by the testator for the payment of his debts, as being in fact not properly a part of it, the whole of the residue must be applied, as far as it will go, to the discharge of the testator's debts; and then the several devisees must contribute, as specified, towards the payment of the debts which shall then appear to be unsatisfied.

But it is said, that there remains about one hundred and fifteen acres of land, parcel of the creditors' fund, as yet unsold; conse-

quently the amount to be made up by contribution from the devisees, cannot be adjusted and determined until that has been sold, and the proceeds brought in and applied in satisfaction of the debts.

It is also represented, that some of the executors have overpaid. According to the course of the court, in such cases, the executor takes the place of the creditor whose claim he has thus satisfied, and is allowed interest accordingly. I see nothing erroneous in the mode of charging interest as stated in the accounts reported by the auditor.

Whereupon, it is *Ordered*, that the exceptions to the auditor's report be over-ruled, and the case is hereby again referred to the auditor, with directions to state an account accordingly, after the whole fund set apart by the will and codicil shall have been applied as therein directed; which may be effected either by a sale of so much of it as yet remains undisposed of, under a decree to be passed for that purpose, or by having it disposed of and adjusted by consent.

After which, the parties having adjusted some of the matters in controversy by an agreement filed in the case, the auditor made a report of the amount with which each of the devisees was chargeable, as contributors to the sum necessary to be raised to meet the amount of claims against the estate, and the case was again submitted to the court.

4th February, 1830.—BLAND, *Chancellor*.—This case standing ready for hearing, and being submitted, the proceedings were read and considered; whereupon it is *Decreed*, that the auditor's report of the 28th of January last, and his additional report of this day, be, and the same are hereby in all respects ratified and confirmed.

And it is further *Decreed*, that the complainant *Thomas Hammond*, on or before the first day of March next, bring into this court the sum of \$240 37 $\frac{2}{5}$, with interest thereon from the said 28th of January last; that the defendants *Philip Hammond*, *Marianna Hammond*, *Harriet Hammond*, *Edward Hammond*, and *Cecilia Hammond*, who are the children of *Philip Hammond, Jr.* deceased, on or before the first day of March next, bring into this court the sum of \$555 28 $\frac{2}{5}$, with interest thereon from the 28th of January last; that the defendant *Rezin Hammond*, on or before the first day of March next, bring into this court the sum of \$1,377 98 $\frac{2}{5}$, with interest thereon from the 28th of January last; that the complainant *John Hammond*, on or before the first day of March next,

bring into this court the sum of \$555 28 $\frac{2}{3}$, with interest thereon from the 28th of January last ; that the defendant *Matilda Hammond*, on or before the first day of March next, bring into this court the sum of \$555 28 $\frac{2}{3}$, with interest thereon from the 28th of January last ; that the defendant *Harriet Hammond*, on or before the first day of March next, bring into this court the sum of \$145 93 $\frac{2}{3}$, with interest thereon from the 28th of January last ; that the complainant *George W. Hammond*, on or before the first day of March next, bring into this court the sum of \$555 28 $\frac{2}{3}$, with interest thereon from the 28th of January last ; and that the defendant *Philip Hammond Newbern*, on or before the first day of March next, bring into this court the sum of \$555 28 $\frac{2}{3}$, with interest thereon from the 28th of January last.

And in case the parties aforesaid, or any of them, shall fail to bring into court the sums or sum of money so as aforesaid decreed to be brought into court by them, him, or her, respectively, in manner as aforesaid, it is further *Decreed*, that the real and personal property devised by the last will and testament of *Philip Hammond, Sr.* deceased, to the persons or person so making default, or such parts or part thereof as may be necessary, be sold for the purpose of raising the sums or sum of money decreed to be brought in by the persons or person so making default respectively ; that *Thos. S. Alexander*, of the city of Annapolis, be, and he is hereby appointed trustee to make the said sales, &c. &c.

And in pursuance of the agreement of the parties, filed on the 16th of January last, and of the additional agreement entered into on the 2d instant, it is further *Decreed*, that the complainants *Thomas Hammond* and *Charles Hammond*, and the defendant *Elizabeth Hammond*, as executors and trustees of the late *Philip Hammond, Sr.* deceased, by a good and sufficient deed, to be executed, acknowledged, and recorded agreeably to law, convey unto the defendant *Rezin Hammond*, and his heirs and assigns, the real estate in the said agreement mentioned, and therein described as the residue of the real estate of the said *Philip Hammond, Sr.* deceased, yet undisposed of by his executors, and consisting of a part of a tract of land called Abington, and supposed to contain about one hundred and fifteen acres and twenty perches of land ; and the said real estate shall thereupon be held by the said *Rezin Hammond*, and his heirs and assigns, free, clear, and discharged from all claim of the parties to this suit, or any or every of them ; but in case the said *Rezin Hammond* shall fail to bring into court

the aforesaid sum of money with interest, as herein before ordered to be brought in by him, or any part thereof, the said trustee, *Thomas S. Alexander*, be, and he is hereby authorized and empowered to make sale of the said parcel of land called Abington, upon the terms, and in the manner, and for the purposes herein before prescribed.

Robert Welch, of Ben. and *Isaac Holland*, administrators of *Barrett*, by their petition stated, that they had recovered a judgment against the defendant *Elizabeth*, as executrix, upon which there was due \$395 05, to secure the payment of which a judgment obtained against *Charles Ridgely*, by the executors of this testator, was, in October, 1828, entered for the use of the petitioner *Welch*; that since that time the amount of this last mentioned judgment had been collected by these executors and brought into this court. Whereupon the petitioners prayed, that the amount due on their judgment might be ordered to be paid to them out of the moneys so brought in.

25th February, 1830.—BLAND, Chancellor.—The judgment against *Charles Ridgely*, was assets in the hands of the executors, and as such could not be applied exclusively by them to the satisfaction of any one of the creditors of their testator, after the decree to account in this case; but it appears that the use was entered, in this instance, some time after that decree; therefore, it is *Ordered*, that the foregoing petition be, and the same is hereby dismissed, with costs.

The trustee, *Alexander*, reported, that being under an impression that the infant defendant *Philip H. Mewbern*, had no means of raising the sum which he had been ordered by the decree to pay; and, at the instance of his guardian, he had sold a part of his personal estate, which the trustee submitted to the consideration of the court. After a publication of the usual order *nisi*, this sale was finally ratified. The amount which some of the other parties were ordered to contribute not having been brought in as ordered, the trustee, *Alexander*, further reported, that he had made sale of a part of the property devised to the plaintiff *John* and his children; of a part of that devised to the late plaintiff *Philip* and his children; and of that parcel of land described in the decree as the residue of the tract yet undisposed of by the executors. And he subsequently reported, that he had sold a part of the real estate devised to the

defendant *Rezin* and his children; and a part of that which had been devised to the plaintiff *George W. Hammond*. These sales were all finally ratified, and the proceeds having been collected, were applied in full satisfaction of all the creditors of the testator; the contributions charged upon the several devisees were finally adjusted, and the estate entirely cleared and settled.

THE FARMERS BANK OF MARYLAND'S CASE.

That clause of the act incorporating The Farmers' Bank of Maryland, which declares that all debts actually due to the company by a stockholder offering to transfer, must be discharged before such transfer shall be made, gives to the bank a mortgage or pledge of such stock.—The bank, as a mortgagee, may sell such stock without suit; but if it fails or refuses to do so, on a bill filed by the administrator of the deceased stockholder, it may be ordered to be sold.

THIS bill was filed on the 19th of November, 1829, by *John W. Duvall*, administrator of *William Warfield*, deceased, against *The President, Directors and Company of the Farmers Bank of Maryland*. The bill states, that the plaintiff's intestate, at the time of his death, held, in his own name, seven shares of stock in the institution of the defendants, on each of which fifty dollars had been paid; that after his death the defendants brought suit, and recovered judgment against the plaintiff, as administrator of the said intestate, to bind a due proportion of assets, which had or might come to hand; that the personal estate of the intestate would not be sufficient to pay his debts; that the plaintiff is entitled to the said stock, or at least to a credit for the value thereof, on account of the said judgment; that he has applied to the defendants for payment of the dividends on the stock thus belonging to his intestate, and for permission to transfer it to any one willing to purchase; and also, demanded that he should be credited on said judgment at the par or market value thereof, together with the dividends which have accrued thereon, all which has been refused by the defendants, who claim it as forfeited; and also claim a dividend of the assets of the intestate, without discounting therefrom the value of the said shares of stock and the dividends thereon. Whereupon, the bill prayed for such a decree as to the court might seem just and equitable.

On the 28th of January, 1830, the defendants put in their an-

swer, in which, after admitting the facts and circumstances set forth in the bill to be true, they state, that in the act of assembly by which they were incorporated, it was declared,

‘That the stock in *The Farmers Bank of Maryland* may be transferred by the holder, in person or by power of attorney, at said bank, or at the branch bank at Easton; but all debts actually due to the company by a stockholder offering to transfer, must be discharged before such transfer shall be made.’ (a)

The defendants further say, that by this provision in that enactment they are bound in behalf, and for the use of the company to retain the stock until the debt actually due from the complainant’s intestate has been discharged; that when the complainant is prepared to discharge said debt, or to reduce it to the sum for which the said shares of stock will sell, these defendants will have no objection to a sale of them, in order to pay off the balance. As, however, the said clause, in the act by which they have been incorporated, not only grants to them the privilege of retaining the stock, but obliges them to retain it until the debt is paid off; they consider it to be their duty to resist the demand of the complainant, and to submit to this court, whether the complainant, without paying the debt due from his intestate, and which considerably exceeds any price which could be obtained for said shares of stock, can ask, consistently with their charter, that the shares be sold, or that a credit for the amount of them be given on said judgment.

15th March, 1830.—BLAND, *Chancellor*.—This case having been submitted on the bill and answer alone without argument, the proceedings were read and considered.

The whole matter in controversy turns upon what may be deemed the true construction of the last clause in the section set forth in the defendant’s answer of the act by which this institution has been incorporated. The seventeenth section of that act declares, that ‘it would greatly tend to promote the agricultural and manufacturing interests if this bank should be authorized to make loans on more extended principles than have heretofore been adopted by similar institutions in this state;’ and then proceeds to enact, that this bank shall be authorized to open cash accounts, and make loans on a more than usually liberal mode, as therein prescribed; provided they obtain such reasonable personal or landed security as they may require.

There is nothing in this section which directly relates to the transfer of the stock of the institution; but it manifests the enlarged spirit of accommodation in which its affairs were proposed to be conducted, and the liberal manner in which money might be obtained from it. Loans were to be made upon reasonable personal or landed security; and the directors were to be clothed with ample power to lend upon those terms. Considering this authority to make loans upon more extended principles, it is obvious, that according to the spirit of its charter, the institution should not only be authorized to require reasonable security in the first instance, but that it should also be allowed to lay hold of every just means of obtaining satisfaction from its litigious or delinquent debtors. This, I am satisfied, was the true intention and sole object of this provision of the twentieth section of the act of its incorporation as set forth in the defendant's answer. It was intended to give to the bank a mortgage or lien on its stock held by that class of its debtors and nothing more. (*b*)

If, as is alleged by the answer, the debt must be first paid, before the body politic can be allowed to transfer any stock so held; or the president and directors are bound, in behalf of the company, to retain the stock until the debt is actually and fully paid, the very end in view, as is demonstrable from this case, may be defeated; and the debt may never be paid or collected. Here it is alleged by the administrator, and not denied, that he has not a sufficiency of assets to pay all; he is not therefore bound to pay the entire of any one debt; nor indeed is he allowed to apply the assets in satisfaction of any one debt exclusively; or in any other manner than in due proportion to all; and consequently, the condition on which alone this stock can be transferred, as the bank interprets this clause of its charter, never can be complied with. Or suppose the debtor himself to be living, but insolvent and utterly destitute of the means of satisfying the claim, then, according to the position of these defendants, no transfer could be made, and the stock standing in the name of the insolvent, with its accumulating dividends, must be locked up for ever, dead and useless to every one.

Rejecting, therefore, those constructions of this clause which lead inevitably to the grossest injustice, I consider it as intended merely to give to the bank an additional security, to the value of

the stock so held, against its delinquent debtor. The security, which arises by operation of that clause out of such a state of things, must be considered as a lien upon, or pledge of the stock of the debtor to the bank, who must be permitted to stand or proceed as a mortgagee in all respects whatever. (c) Considering the bank as a mortgagee of this stock, it might, as in all similar cases, without a bill to foreclose, on giving notice to the debtor, have proceeded to sell at public auction; and have applied the proceeds of sale in satisfaction of its claim, and paid over the surplus, if any. (d) Or if, after the bank had had the full benefit of the security, which had thus accrued to it in virtue of this clause, by a sale of the stock of its delinquent debtor, and it should turn out, that the proceeds of such sale were not sufficient to satisfy its whole claim, principal, interest and costs; then it might have sued for and recovered the balance of the debtor, if living; or, as in this instance have come in, for the amount so left unpaid, with the other creditors for a due proportion of the assets of its deceased debtor. (e)

But although the bank might have sold this stock without a bill to foreclose, yet as it has hitherto and still does refuse to do so, I see no just reason why it should not now be ordered to be sold, to enable this plaintiff to settle up the estate of his intestate, and to distribute the assets in due proportion among the general creditors of the deceased; considering the bank as one of them only for so much, if any, as shall remain unpaid after this stock, with the dividends thereon declared and retained by it, have been so applied toward the satisfaction of its claim. I shall, therefore, direct this stock to be sold for this purpose, and transferred to the purchaser accordingly; and also, that the dividends which may have been declared before the day of sale, and which have been retained, shall be, in like manner, applied towards the discharge of this claim of the bank.

The amount of the debt due to the bank from the estate of the intestate is not specified in the bill or in the answer, nor is it stated what dividends have been declared on the stock; these I presume are oversights, of which it is not the intention of either party to take any advantage. Therefore, let the pleadings be corrected in these particulars, and a decree be prepared accordingly.

(c) *Union Bank v. Laird*, 2 Wheat. 390.—(d) *Powel Mortg.* 962.—(e) *Powel Mortg.* 1001, 1081.

Immediately after this, the pleadings were, by mutual consent, amended as suggested, a decree was prepared, and the case was again submitted.

16th March, 1830.—BLAND, Chancellor.—*Decreed*, that the defendants give credit to the complainant, on account of the judgment in the proceedings mentioned, for the several amounts stated in the paper marked D, as of the dates of the several dividends due to the complainant; and also, with such other dividends as may accrue on the stock before the sale thereof, as herein after decreed. And it is further *Decreed*, that the shares of stock in the bill mentioned be sold, and that *Somerville Pinkney* be, and he is hereby appointed trustee to make the said sale, &c. He shall then proceed to sell the said shares of stock to the highest bidder for cash, to be paid on the day of sale or ratification thereof by the Chancellor, giving at least ten days notice by advertisement, in one of the newspapers published in the city of Annapolis, of the time, place, manner, and terms of sale, &c. And upon the ratification of said sale and payment of the whole purchase money, and not before, the trustee shall in the usual form transfer to the purchaser or purchasers the shares of stock to him, her, or them sold, &c.

After which the stock was sold as directed, upon which an account was stated by the auditor, which was confirmed on the 3d of June, 1830, leaving a balance of \$3,316 65 still due to the defendants.

DEAKINS' CASE.

The proceedings of a trustee appointed, under the act of assembly, to dispose of property directed by a will to be sold for the payment of debts or other purposes, may be limited and controlled.—In appointing such a trustee, the court does not confer upon him an authority more extensive than that specified in the will.—An order, directing a trustee to suspend further proceedings, operates as an injunction.—Where certain proceedings, apparently distinct, relate to the same estate, and have been linked together by an order, they may be thenceforward proceeded in as one suit.—An *ex parte* petition to appoint a trustee to sell under a will, may be treated as a creditor's suit; and the creditors of the testator notified to file the vouchers of their claims.—On a return *cepi* to an attachment, the sheriff may be ordered to bring in the body.

THIS petition was filed on the 6th of August, 1817, by *Edward Thomas*, in which he states, that the late *William Deakins* had, by his last will, devised his real estate to be sold by his executor

Francis Deakins, for the payment of his debts ; that *Francis Deakins* had died, leaving the trust reposed in him unexecuted ; that letters of administration, *de bonis non* with the will annexed, had been granted to *John Hoyer* ; and that the petitioner was a creditor of the testator to a large amount, as appeared by a short copy of a judgment then exhibited. Whereupon he prayed, that another trustee might be appointed, according to the provisions of the act of assembly, (a) who should be directed to make sale of the property devised, for the payment of the debts of the deceased.

The will of the late *William Deakins*, so far as it concerns this case, is in these words. 'I give and bequeath to my wife *Jane*, and her heirs forever, the three lots upon which we now dwell, in Georgetown, together with all the houses, buildings, improvements and appurtenances thereupon being, and thereunto belonging ; also that house and lot in Georgetown, whereupon *George Black* now lives. My tracts of land at or near the mouth of Senaca creek, in the county of Montgomery, the one called Senaca landing, the other called Fortune, supposed to contain upwards of one hundred and fifty acres, be the same more or less. All which I give to my said wife and her heirs forever.'

'I hereby give and devise the whole of my estate, both real and personal, not herein before devised, to my brother *Francis Deakins*, and his heirs forever ; for the uses and purposes of this my will herein after expressed. My will is, that all my just debts be paid, in the first place, out of the property so devised as aforesaid to my brother *Francis* ; and in the manner of paying those debts my will is, and I so direct, that all my bank engagements be first paid and discharged, so as in the first place to exonerate and indemnify all and every person whatsoever, who may in any manner be answerable for me, on account of their endorsements upon any paper, or on account of any engagements they may have entered into for me with any bank ; and secondly, I do direct, that all debts due from me, wherein others stand bound for me as securities, or as endorsers, or in any other way, be paid off and discharged, so as to exonerate and indemnify any and every person whatsoever, who stands in any manner bound for me ; and lastly, that all other just debts due from me, be paid off and discharged as soon as can be. And to enable my executor herein after named, to fulfil this my will, I do hereby authorize and empower him to sell all or any part of my

estate herein before devised to him, for cash or upon credit as he shall think proper, without being in any manner responsible for any insolvencies or losses which may happen upon such his sales. Item, at the expiration of seven years after my death, that the property so devised as herein before mentioned to my brother *Francis*, be divided among my brothers as follows: after all my debts are paid; *first*, on account of the great trouble which he will have in the execution of this my will; I give to my brother *Francis Deakins*, and his heirs for ever, one-half of the said estate; the residue I devise to my brothers *Leonard Marbury Deakins* and *Paul Hoyer*, and their heirs forever, equally to be divided between them as tenants in common, and not as joint tenants. And *lastly*, I hereby constitute and appoint my said brother *Francis Deakins*, whole and sole executor of this my last will and testament, hereby revoking all others. Given under my hand and seal, this 2d March, 1798.'

This will was proved before the Orphans Court, of Montgomery county, on the 12th of March, 1798.

26th September, 1817.—KILTY, Chancellor.—This petition with the exhibits, has been before me for some time. I was under the impression, that a sale had heretofore been decreed or made under some authority, but I do not find that it has been the case. A great many years have elapsed since the death of *W. Deakins*. The complainant might have proceeded under another part of the act of 1785; nevertheless he may have a right to proceed under the fourth section; but an affidavit will be required, that no part has been received from *W. Deakins*, or *F. Deakins*, or *J. Hoyer*, the present administrator, who may have assets, for which purpose exhibit C may be withdrawn. And if the decree is passed, it will be for the sale of only a part of the real estate.

On the 15th of October, 1817, the petitioner *Thomas* filed his affidavit, in which he averred that he had not received any part of the money mentioned in the judgment he had recovered against *Hoyer*, the administrator *de bonis non*, from *John Hoyer*, *W. Deakins*, *F. Deakins*, or any other person, and that the money was then due and owing to him.

16th October, 1817.—KILTY, Chancellor.—No other creditors having applied, it is unnecessary to sell the whole of the real estate; and it is to be understood, that no more is to be sold than will pay the complainant's debt with interest and costs, and the costs of this suit, and commissions and expenses as near as it can be effected.

It is thereupon *Decreed*, that so much of the real estate in the proceedings mentioned, whereof *William Deakins* died seized, lying and being in the state of Maryland, as may be necessary, be sold for the payment of the debt in the proceedings mentioned. That *B. S. Pigman* be, and he is hereby appointed trustee to make the said sale, &c. which shall be on a credit of twelve months, with interest from the day of sale; the purchaser to give bond with approved surety, &c.

On the 18th of January, 1818, *John Hoyer*, as administrator *de bonis non*, with the will annexed of the late *William Deakins*, filed his bill in this court against *Edward Thomas*, in which bill *Hoyer* states that the defendant *Thomas* had recovered judgment against him as administrator for a large amount; in satisfaction of which judgment, the defendant *Thomas* had agreed to take lands in Virginia; but that he had since refused to comply with the agreement on his part, by selecting and accepting the lands as stipulated; which agreement this plaintiff was then, and had always been ready to perform on his part. Whereupon, the bill prayed for a specific performance of the agreement, and for general relief.

B. S. Pigman having declined to act as trustee under the decree, the matter was brought before the court.

7th April, 1818.—KILTY, Chancellor.—Ordered, that *John A. T. Kilgour* be, and he is hereby appointed trustee in the room of the said *Pigman*, to give bond in the same penalty, and to have the same powers as if appointed by the original decree.

On the 26th of April, 1819, *John Threlkeld*, and *Elizabeth* his wife, filed their bill against the trustee *John A. T. Kilgour*. The bill alleges that *Jane Deakins*, the devisee of the late *William Deakins*, was dead, leaving this plaintiff *Elizabeth* her sole devisee and heir at law; that the trustee *Kilgour* had advertised for sale some of the lands which had been devised to the late *Jane*, and which were then held by these plaintiffs, to satisfy the debt alleged to be due to the petitioner *Edward Thomas*; that these plaintiffs were unable to say any thing about his claim; but they presumed that if the petitioner had filed his bill of complaint against the heirs and devisees of the late *William Deakins* the plea of limitations would have been a bar to an application for a sale of the real estate for payment of debts. Whereupon the bill prayed for a *subpœna*, and also for an injunction to prohibit the trustee *Kilgour* from pro-

ceeding to make sale. To this bill there was subjoined the affidavit of the plaintiff *John Threlkeld* of the truth of the facts therein set forth.

27th April, 1819.—KILTY, Chancellor.—It appears that the land devised to *Mrs. J. Deakins* has been considered by the trustee as liable to sale under the decree, instead of the estate devised to *Francis Deakins* for the payment of debts. The trustee is, therefore, directed not to proceed to the sale of the land mentioned in the petition and in the advertisement, lying at the mouth of Senaca, until further order; which may be made on hearing after such notice as may be directed.

On the 6th of June, 1821, *John Hoyer* filed his bill of revivor, stating that *Edward Thomas* had died without answering his bill filed on the 18th of January, and that he had, by his will, appointed *William R. King* and *Edward T. Hebb* his executors, against whom he prayed that his suit might be revived, and therefore prayed *subpœnas* against them.

After which, *John Hoyer*, on the 30th of June, 1821, filed his petition, in which he recites all these before-mentioned proceedings; and that the sale might not be made before the determination of his suit commenced by his bill filed on the 18th of January, he prayed that the trustee might be directed to suspend the sale until further order. The allegations of this petition were verified by his affidavit.

2d July, 1821.—KILTY, Chancellor.—In the bill by *Hoyer* against *Thomas*, no mention was made of the decree for a sale, which, if improperly obtained, ought to be set aside. At present the trustee *John A. T. Kilgour* is directed not to make any sale under the decree till further order.

On the 22d of January, 1822, the defendants *King* and *Hebb* put in their joint answer to the original bill and bill of revivor of *Hoyer*, in which, after admitting most of the facts stated in the bill, they allege by way of avoidance, that *Hoyer* had it not in his power to make them a good title to the lands mentioned in the agreement; that he had not complied with the agreement on his part, by reason of which they were in no respect bound by it; that the validity of the agreement had, by plea, been put in issue in a suit at law between them, but had been withdrawn and a judgment by confession rendered; and consequently, it could not now be of any avail to the plaintiff *Hoyer*.

24th November, 1824.—BLAND, Chancellor.—The arguments of counsel having been heard, the proceedings were read and considered.

This case has been brought before this court by two separate and original proceedings, which have now become intimately and necessarily blended. The *ex parte* petition of *Edward Thomas* brought in the first part of it; and the bill of *John Hoyer* introduced the second part. These two distinct proceedings, moving separately, and apparently having entirely different objects, were shewn to have an intimate connection with each other by the petition of *Hoyer*; and were linked together by the order of the 2d of July, made on that petition. Looking then into all the proceedings and exhibits, the case as it now stands before the court is this:

William Deakins being seized of certain real estate, made his will disposing of the whole, and died. He gave a part of his real estate to his wife *Jane*; and the rest he devised to his brother *Francis Deakins*, who he appointed his executor, in trust, in the first place, to be sold for the payment of his debts. In May, 1804, *Edward Thomas* obtained a judgment against *Francis*, the executor of *William*, for a large sum of money, with interest and costs. *Francis* died without having sold the real estate of his testator for the purpose of executing the trusts reposed in him; and administration *de bonis non* was granted to *John Hoyer*. After which, by a written agreement between *John Hoyer* and *Edward Thomas*, it was stipulated, that in consideration of certain lands in Virginia being conveyed to *Edward*, he should assign over all his right to the judgment he had obtained against *Francis*, to *John Hoyer*. After which *Edward Thomas* filed his petition here; upon, and subsequent to which the before mentioned proceedings were had.

Had *Francis*, the testamentary trustee, attempted to sell the real estate devised to *Jane*, he might have been restrained by an injunction; or if he had made a sale, it would have been deemed void. And if he had attempted to sell that real estate which was actually devised to him to be sold for the payment of the testator's debts, under the pretence of paying debts, when in fact and truth there were no debts really due, those interested in the estate might have had their interests protected by an injunction. I conceive there could have been no doubt of the propriety of the exercise of such an authority in restraint of the testamentary trustee *Francis Deakins*, were he living.

Edward Thomas expressly founds his petition upon the act of

assembly which provides, that this court shall have full power and authority, upon the application or petition of any person interested in the sale of property devised as this was, to appoint a trustee for the purpose of selling and conveying such property, and applying the money arising from the sale to the purposes intended. (b) But in appointing a trustee, under this law, as a mere successor to the testamentary trustee, it could not be presumed, that the court intended to confer upon him an authority more extensive than that to be found in the will, or instrument specifying the objects of the trust. Hence the stay of proceedings, or injunction upon the trustee, so far as regards the interests of those who claim under *Jane*, the facts having been admitted, must be made perpetual.

But the purpose to which the money arising from the sale was to be applied, was, among others, the payment of this debt said to be due to *Edward Thomas*; if it had been shewn, that there was, in fact, no debt due to him, the trustee *Francis Deakins* would not have been allowed to sell, upon the pretext of a necessity to do so, to satisfy that debt. And consequently, the court will not now appoint and authorize a trustee to take the place of *Francis*, and do that very act which it would have prohibited *Francis* from doing were he alive.

The order of the 2d of July, 1821, operates as, and must be considered in the nature of an injunction. And in looking into the answer of the executors of *Edward Thomas*, to see whether there is any thing there which will authorize or require the rescission or dissolution of the injunction order, I find that none of the material facts upon which it was originally based have been denied or removed; therefore,

It is *Ordered*, that the authority conferred on the trustee appointed by this court to make sale of the real estate of the late *William Deakins*, be construed to extend only so far as the same may be warranted by so much of the will of the late *William* as clothed his late brother *Francis Deakins* with authority to sell the same, and no further. And it is moreover *Ordered*, that no sale whatever be made, by any trustee appointed by this court, of any portion of the real estate of the late *William Deakins*, which by his will was authorized to be sold for the payment of his debts, for the purpose of paying the debt now alleged to be due to the

executors of *Edward Thomas*, deceased, until the final hearing of this case, or further order.

After which a commission was issued, by virtue of which testimony was taken in this case under the name of *Hoye* against *King* and *Hebb*; and the whole matter was again brought before the court.

14th December, 1827.—BLAND, *Chancellor*.—This case standing ready for hearing, the solicitors of the parties were heard, and the proceeding read and considered.

The late *Edward Thomas*, in the year 1804, obtained a judgment against *Francis Deakins*, executor of the late *William Deakins*, for the sum of \$3,390 50, with interest from the 1st of November, 1797, and costs. After which, *Francis Deakins* died, and administration *de bonis non* upon the estate of the late *William*, was granted to the plaintiff *Hoye*. On the 26th of March, 1805, soon after *Hoye* had thus obtained letters of administration, he entered into an agreement with *Edward Thomas* to let him have certain lands, as therein described, in Randolph, Hampshire, or Hardy county, in Virginia, to be shewn by *Hoye*, when called upon, to the value of \$3,050 65, in full satisfaction of *Thomas*' claim against the estate of the late *William Deakins*. In consideration of which *Thomas* agreed to assign his judgment to *Hoye*. And in case *Thomas* should neglect to designate the lands, and have them valued, in the manner specified, before the 1st day of July then next, *Hoye* was to have so much of certain lands laid off and conveyed, as, at five shillings per acre, would amount to the sum of \$3,050 65. And then *Hoye* stipulates to have the conveyance made and the deed ready for *Thomas* by the last day of July then next.

A few days prior to the 7th day of December, 1805, *Elijah Butler* surveyed 4,576 acres of land, as he says in his letter to the plaintiff, for *Edward Thomas*; but there is no proof that *Thomas* ever knew of, or assented to this survey, much less, that he accepted of the land thus laid off. On the contrary, it appears, by a letter of *Edward Thomas*, dated on the 16th of December, 1805, and another of the 22d of April, 1806, which have been produced as evidence by the plaintiff, that up to that time *Hoye* had not, on his part, complied with the agreement. A third letter from *Thomas*, dated on the 16th of August, 1806, has been produced and relied on by the plaintiff, which evidently alludes to some departure from the original agreement, which *Thomas* was willing

to concede on *Hoye's* granting the indulgence therein asked for; but what was done in consequence of the proposition, thus made, does not appear.

Long after which, in the year 1815, *Edward Thomas* sued out a *scire facias* on his judgment against this plaintiff *John Hoye*, as administrator *de bonis non* of the late *William Deakins*. To which *Hoye* appeared and put in five pleas, in one of which he relied on the agreement of the 26th of March, 1805; and alleged, that the land therein mentioned became the right and estate of *Thomas*, and was received by him in full satisfaction of his judgment. But afterwards *Hoye* withdrew his pleas; and on the 24th of April, 1817, confessed judgment, as appears by the record, to bind assets in hand, and future assets as they accrued.

After which *Hoye* filed this bill, asking for a specific performance of the agreement of the 26th of March, 1805; but *Thomas* having died before he had answered; *Hoye*, by a bill of revivor, made his executors parties. The original bill alleges, that on the 5th of January, 1816, *Hoye* executed a deed for lands according to the agreement, which deed he tendered to *Edward Thomas's* attorney, on the 25th of April, 1817, who refused to accept it. But the answer of the defendants in no manner admits this deed; and there is no proof whatever of it; or of its conformity to the agreement.

Upon the state of facts, I feel perfectly satisfied, that the complainant cannot have the relief he asks, even supposing the agreement to have been not at all affected by the proceedings at law; and to be such a one as a court of equity would specifically enforce; because the plaintiff *Hoye* has, in fact, altogether failed to perform his part of it, according to its clear and positive provisions. But, if he had complied with it, he has not placed himself here in a condition to obtain the relief he seeks. He has not brought all the proper parties before the court. The executors of *Edward Thomas* might assign the judgment; but his heirs are the persons, who alone are to be benefitted or affected by any conveyance of the specified lands, that had been made, or which might now be ordered by the court.

Whereupon it is *Decreed*, that the said bill of complaint of *John Hoye*, be and the same is hereby dismissed with costs to be taxed by the register. And it is further *Decreed*, that the order of the 2d of July, 1821, together with so much of the order of the 24th of November, 1824, as prohibits the trustee from making sale of so much of the real estate of the late *William Deakins*, as was autho-

rized and directed to be sold by his last will and testament, be and the same is hereby rescinded and annulled.

It was represented, by a petition of *King* and *Hebb*, the executors of *Thomas*, filed on the 14th of December, 1827, that the trustee *Kilgour* had died; upon which they prayed, that *Daniel Duvall* might be appointed in his place; which was ordered accordingly. And *Duvall* having declined to act, *William F. Hebb* was, by an order of the 8th of April, 1828, appointed trustee to succeed the late *John A. T. Kilgour*.

On a petition filed, on oath, by *Hoye*, the administrator *de bonis non* of *Deakins*, praying that the trustee *Hebb* be ordered to report, &c.

3d February, 1829.—BLAND, Chancellor.—Ordered, that the trustee *Hebb* make a report of his proceedings, as prayed, or shew good cause to the contrary. Provided, that a copy of this order, together with a copy of the foregoing petition, be served on him on or before the third day of March next.

On the 26th of February, 1829, the trustee *Hebb* reported, on oath, that he had made sale of certain portions of the real estate of the late *William Deakins*, to the amount of \$250; which sale was finally ratified on the 31st of August, 1829.

John Hoye, by his petition, stated that the trustee *Hebb* had neglected to discharge his duty as diligently as he ought to have done; and that he, *Hoye*, was willing to take the bond given for the purchase money in satisfaction of his claim, the voucher whereof had been heretofore filed, as a creditor of the late *William Deakins*. Whereupon he prayed, that the trustee might be ordered to make a report of his proceedings and to bring in the bonds, &c.

10th August, 1829.—BLAND, Chancellor.—Ordered, that the trustee *William F. Hebb* forthwith deposite and file in the chancery office, the bonds and notes taken by him for the purchase money; and also bring into court any purchase money now in his hands; and likewise shew cause, if any he hath, why he has failed to discharge his duty, as trustee, as alleged: provided, that a copy of this order, together with a copy of the petition to be served on the said *William F. Hebb*.

John Hoye, by his petition filed on the 21st of January, 1830, stated that he was a creditor of the late *William Deakins*, and as

such had filed the vouchers of his claims; but, from some error or defect in the original decree or other proceedings, no notice had been given to his creditors to file the vouchers of their claims against his estate. And that a copy of the order of the 10th of August, had been served on the trustee *Hebb*, but he had not yet complied with it. Whereupon the petitioner prayed for an attachment against *Hebb*; and that the creditors of the late *William Deakins*, might be notified to file the vouchers of their claims, &c.

22d January, 1830.—BLAND, *Chancellor*.—Ordered, that an attachment issue against *William F. Hebb* as prayed, returnable forthwith. That the creditors of *William Deakins*, deceased, file the vouchers of their claims in the chancery office, on or before the 22d day of June next. And that a copy of this order be inserted in some newspaper, printed at Cumberland, once in each of three successive weeks, before the first day of March next.

On the 15th of March, 1830, the trustee made a report, on oath, in which he stated, that the purchaser having refused payment, he had put the notes taken by him for the purchase money into the hands of an attorney, to bring suit thereon; that they were then in his hands for that purpose.

17th March, 1830.—BLAND, *Chancellor*.—The attachment issued against *William F. Hebb*, having been returned attached, it is on motion of the solicitor, for the petitioner *Hoye*, Ordered, that the sheriff of Washington county forthwith bring into court the body of the said *William F. Hebb*, according to the tenor of the said attachment.

On the 30th of April, 1830, the trustee *Hebb* made another report, on oath, similar to that filed on the 15th of March. On the 13th of December, 1830, the executors *King* and *Hebb*, filed objections to an allowance of any of the claims now filed, or which might hereafter be filed, &c. Some time after which, the matters in controversy were finally adjusted by an agreement among the parties, and the case so closed.

JONES v. STOCKETT.

A legacy to a woman directed to be put out on good security, and the annual interest to be paid to her during her life, remainder to her children should not be placed in the hands of her husband on any terms, or be lent on mere personal security.—The legatee for life, of such a legacy, should be heard as to the mode of putting out the legacy; the court, considering itself as *ex officio* guardian of the interest of those in remainder, the legacy was, on the suggestion of the legatee for life, invested in bank stock; and the loss of interest, which might have been made, from the time the money was brought into court until it was invested, was directed to be borne by the legatee for life.—An annuity, like a pecuniary legacy, in general, carries interest only from one year after the death of the testator; the exceptions to this rule.—Under the head of just allowances a trustee may be allowed a fee paid to a solicitor for advice in relation to his trust.—A complaint, that a trustee holds the trust fund in his hands idle and unprofitable, necessarily implies that it should be brought into court and invested.—There are few cases in which trustees may not decline to act without direction of the court.—Although a trustee may have no pecuniary interest in the subject, yet he has duties to perform, in regard to which he should keep the court correctly informed.—In what cases, and how far the court will interfere with the relations of parent and child.—In what cases the court will remove or discharge a trustee, after he has accepted the trust.

THIS bill was filed on the 16th of October, 1823, by *Samuel Jones of Joshua*, and *Ann* his wife, against *Richard G. Stockett* and *Henry Wayman*. The bill states that *Larkin Shipley*, on the 19th of February, 1822, made his last will and testament, in which among other things, he gave and bequeathed as follows :

‘I give and bequeath to my niece *Ann Shipley*, the sum of \$7,000 current money of the United States, subject to the conditions and limitations hereafter prescribed; that is to say, the annual interest thereof shall be paid to her yearly during her natural life; and if she should marry, and die leaving lawful issue, then, on the event of her death, the said principal sum of \$7,000 shall be equally divided among her children; but in case my said niece shall die without lawful issue of her body, then, and in that case, I give and bequeath the aforesaid principal sum of \$7,000 to be equally divided among the children of my deceased brother, and their legal representatives, reserving, nevertheless, an annuity of \$120 to be paid out of the said principal sum of \$7,000 to *Elizabeth*, mother of the said *Ann* during her natural life; which sum I direct my said trustees to pay to her yearly; it being my design and intention, and I hereby declare that my said trustees, or the survivor of them, shall retain in their hands the said principal sum of \$7,000, and put the same out on interest, on good security, for the purposes aforesaid; and I further declare, that the aforesaid bequest to the said *Ann*

Shipley, my niece, shall be deemed and taken as full satisfaction for any claims against me that may arise for becoming one of the securities on the administration of her father's estate.'

And again, after making some other dispositions of his property, he says, 'I give and devise all the rest and residue of my estate, both real and personal, (subject, nevertheless, to the control, custody, and possession of my trustees, as hereafter described,) to my nephew *Larkin Shipley*, the son of my brother *John*, for and during the term of his natural life, and no longer; and if he should depart this life without issue of his body, lawfully begotten, then to be equally divided among his brothers and sisters; but if he should have lawful issue of his body at the time of his death, then, to such issue, share and share alike. I also authorize and direct that my said trustees shall have and retain the sole possession and custody of the said estate so given, as aforesaid, to my said nephew *Larkin*, for the purpose of educating him, and are to rent out the real estate, and put out the money on interest to the best advantage; pay away the yearly proceeds, after his arrival at age, to him; but to retain a control over the principal till the objects of this bequest and devise are fully complied with. *Item*.—I nominate and appoint *Richard G. Stockett* and *Henry Wayman*, and the survivor of them, whole and sole trustees and executors of this, my last will and testament, with full power for either of them to act in case of the death of the other, to carry into full execution all the matters and things aforesaid.'

Soon after which, *Larkin Shipley* died, and his will was, on the 18th of April, 1822, proved before the Orphans Court of Anne Arundel County, and letters testamentary thereupon granted to the two executors therein named, who took upon themselves the execution of the trust therein mentioned. The bill further states that the legatee and plaintiff *Ann* had, since the death of the testator, intermarried with the plaintiff *Samuel*; that the defendants, as trustees, had paid a part of the interest on the plaintiff *Ann's* legacy to her before her marriage, and a small sum since that time; but not the whole of what was due; and no provision had been made for the punctual payment of the said interest, whereby she has sustained considerable inconvenience; that the defendant had not put out the said sum of \$7,000, or any part of it, at interest on good security; but that the same remained in their hands, or in the hands of one of them, which neglect and omission were contrary to the directions of the will, and put at great hazard the principal

sum, and consequently the interest thereon. Whereupon, the bill prayed that the defendants might be required to give a full statement of the condition of the said \$7,000; and what remained due of the interest thereon; that they be directed to pay the balance thereof, and especially, that they be required to put out at interest the said sum of \$7,000, on good security, so that the interest thereof might be paid punctually, and at short and convenient periods, to the plaintiffs.

On the 26th of March, 1824, the defendant *Stockett* put in his answer, in which the will and the marriage of the plaintiffs, as set forth in the bill, were admitted. He exhibited with his answer an extract from the inventory returned by the executors; and in reference thereto, described the then situation of the testator's estate, which, he said, the executors were collecting and settling with as little delay as practicable; that sundry payments had been made to the plaintiffs, whereby it appeared that they had received about two hundred and eighty dollars over and above what they were strictly entitled to; and, in conclusion, this defendant says, that he submits that a decree may pass directing the executors to report, from time to time, on the state of the property; and to bring in the money arising from the debts as it may be received; and that the same be invested as the court may direct.

After which the defendant *Stockett*, by his petition, stated, that he had received a very large sum of money applicable to the trusts of the will; and thereupon prayed to be authorized and directed to invest the same in some safe and productive fund, &c.

31st August, 1825.—BLAND, Chancellor.—Ordered, that *Richard G. Stockett*, the petitioner, be, and he is hereby permitted and directed, to deposit any sum of money now in his hands, or which may hereafter come into his hands, as a part of the said trust fund, with the register, to be by him deposited in the Farmers Bank of Maryland to the credit of the case, subject to further order.

The plaintiffs *Jones* and wife, by their petition, stating that the defendant *Stockett* had, under this order, paid into court the sum of \$1,652 28; and that the executors were perfectly willing that the money already deposited, and which might thereafter be deposited on account of the said trust fund, should be paid over to the plaintiff *Samuel*, upon his giving bond with approved surety. Whereupon they prayed that the same, together with all the residue of

the trust fund, when deposited, might be paid to the petitioner *Samuel*, on his giving bond with approved surety.

21st September, 1825.—BLAND, *Chancellor*.—The petition of *Samuel Jones* of *Joshua*, and *Ann* his wife, has been read and considered. It was my intention, by the order of the 31st of August last, to place the money constituting the legacy to the plaintiff *Ann*, at once in perfect security, and to give her time to be heard as to the mode of investment, so far as the testator had allowed of any range of discretion in that respect. From the language of the will, it certainly could not have been the intention of the testator that the legacy he thus gave to his niece should be put into the hands of her husband, upon any terms whatever. But apart from that manifest intention, where the profits only of a legacy are given, as in this instance, to a woman for life, and the principal in remainder to her children, it might evidently be attended with the most pernicious and ruinous consequences to take the principal, given to the children in remainder, from the hands of the trustees, and place it in the hands of their father. His influence might prevent them from exacting from him their just right during his life; and on his death insolvent, they might feel a great repugnance to making his securities answer for the loss they had sustained by reason of his misfortunes. (a) The good feelings between parent and child, so far from being put in jeopardy, should be sustained and cherished. (b) Therefore, even if this money might be put out upon mere personal security, I should deem it improper to place it upon such security, in the hands of the father of those who are to take in remainder. (c) The testator has, however, apparently aware of the ill consequences of such a disposition of the fund, expressly declared it to be his design, that the trustees should retain in *their* hands the principal sum of \$7,000, and put the same out on interest on good security, for the purposes aforesaid.

But, as the annual and punctual payment of the interest payable to *Ann*, must depend in a great degree upon the form of the investment, I was unwilling to make the selection until the plaintiffs had been heard. The meaning of the phrase ‘good security,’ used by the testator, must be taken in connexion with that indefinite, and perhaps great length of time, during which it is very evident he

(a) *Carpenter v. Heriot*, 1 Eden, 341; *Wycherley v. Wycherley*, 2 Eden, 180.—

(b) *Ex parte Hopkins*, 3 P. Will. 155; *Lempster v. Pomfret*, Amb. 154; *Lyons v. Blenkin*, 4 Cond. Cha. Rep. 115.—(c) *Langston v. Olivant*, Cooper’s Rep. 33.

intended it should continue to be 'good security;' and thus, understanding the testator to mean permanently and durably good security, I feel that my discretion must be limited to a selection among securities of that description; that is, government stock, or a mortgage on unincumbered real estate, or good bank stock. But apart from this manifestation of the testator's intention, it must be recollected, that generally, in cases of this kind, if the trustees were of themselves to put this legacy out on mere personal security, it would be deemed a breach of trust, and they would be held accountable accordingly. (*d*) The prayer of the plaintiffs cannot be granted; and, therefore, it is *Ordered*, that the said petition be, and the same is hereby dismissed with costs.

On the 16th of December, 1825, the defendant *Wayman* put in his answer, in which he admits the will of his testator; and states, that a provision having been made therein for the testator's nephew *Larkin Shipley*, as well as for the plaintiff, it was agreed, that the defendant should take charge of the bequest to the legatee *Larkin*; and that the other defendant should manage the legacy given to the plaintiff *Ann*; that a large proportion of the testator's estate consisted of bonds and notes, some of which, and particularly those deemed doubtful, had been collected, or pressed for payment, leaving such as were good to stand on interest; considering them as good investments as could be made within the meaning of the testator's will; that he had made some payments to the plaintiff *Ann*; and that he had wished to have had the whole of her legacy paid over to her husband as proposed by him; but that the court had determined otherwise.

After which *Jones* and wife, by their petition, prayed that the investment might be made in stock of the Bank of Westminster.

20th January, 1826.—BLAND, *Chancellor*.—*Ordered*, that the trustees *Stockett* and *Wayman*, unless cause to the contrary be shewn by them, on or before the fourth day of the next March term, be and they are hereby directed and required to invest the money heretofore brought into this court, in stock of the Bank of Westminster; the said stock to be transferred to, and held by and

(*d*) *Brown v. Litton*, 1 P. Will. 140; *Trafford v. Boehm*, 3 Atk. 444; *Adye v. Feuilletau*, 1 Cox, 24; *De Manneville v. Crompton*, 1 Ves. & Bea. 359; *Wilkes v. Steward*, Cooper's Rep. 6; *Walker v. Symonds*, 3 Swan. 63; *Collis v. Collis*, 2 Cond. Cha. Rep. 459.

in the name of the said trustees for the uses, intents and purposes in the proceedings mentioned, and the interest or dividends thereon, as the same may become due and be collected, shall be paid by them unto the said *Ann*, the wife of the said *Samuel*, during her natural life; and after her death the said bank stock shall be disposed of and pass as is directed by the last will and testament of the testator. And for the purpose of making such investment, the money will be directed to be paid to the trustees when required, Provided that a copy of this order, together with a copy of the foregoing petition, be served on the said trustees on or before the twentieth day of February next.

The trustee *Stockett*, on the 16th of March, 1826, reported that he had received another sum of \$1,900, and requested to be authorized to invest that sum also; and said, that he had no interest adverse to that of the plaintiff's; and therefore was willing that the investment should be made as proposed, if the court thought the fund secure.

18th March, 1826.—BLAND, Chancellor.—*Ordered*, that the said trustees be and they are hereby authorized and directed to invest the additional sum of about \$1,900 received lately by one of them, as stated, in stock of the Bank of Westminster, upon the terms and as prescribed by the order of the 20th of January last. And no cause having been shewn against the execution of the said order, the same is hereby declared to be absolute; and the said trustees are directed to invest the said sums of money accordingly.

The trustees *Stockett* and *Wayman* reported that they had, as ordered, purchased stock in the Bank of Westminster at \$1 per share above par, that is to say, that they had purchased capital stock to the amount of \$3,330 for the sum of \$3,552 in money. Which they prayed might be confirmed; and that the moneys deposited in court might be applied accordingly.

20th April, 1826.—BLAND, Chancellor.—*Ordered*, that the said report be and the same is hereby ratified and confirmed; and the register is directed to draw a check on The Farmers Bank of Maryland for the whole sum of money which has been deposited, or so much thereof as now remains to the credit of this case, in favour of the said trustees or either of them, or for so much thereof as they or either of them may require for the purpose of its being applied as stated in the said report.

The parties agreed, that the case should be referred to the auditor to state an account of assets, &c. And of the sum due, if any, to the complainants on account of *Ann Jones'* annuity. And also submitted to the Chancellor, 'whether the loss of interest occasioned by the deposit of the moneys brought into court is to be borne by the complainants or the estate?' and 'whether the complainants and defendants, or any of them, are to be allowed costs against the estate?'

25th April, 1827.—BLAND, *Chancellor*.—I have examined the proceedings and reflected upon the questions submitted. The plaintiffs by their bill complained, that the defendants had suffered the legacy, the profits of which were given to the plaintiff *Ann*, to remain in their hands unproductive; whereby the interest, which might otherwise have been accumulated and paid to her, was lost. And prayed, that the trustees might be ordered to make an investment thereof. The defendant *Stockett* answered, and brought into court a great proportion of the legacy, which was ordered to be deposited as usual, as I have before remarked, for safety, and until the plaintiffs should suggest a mode of investment. Hence, it is evident, that the plaintiffs, in effect, called the money into court; and it was their fault, that it remained here so long unproductive. The trustees being blameless, are therefore not chargeable; and there is no ground upon which these plaintiffs can have the estate taxed, to the prejudice of others, for the purpose of re-imbursing them for a loss occasioned by their own mismanagement or negligence: for even if the trustees had been guilty of any misconduct, the estate could not be charged to make good the loss; (e) and upon the same general principles, neither these trustees nor the estate can be charged with costs. (f)

Whereupon it is *Ordered*, that the loss of interest occasioned by the deposit of any moneys in this court, pursuant to the order of the 31st of August, 1825, be borne by the complainants; that they pay all costs; and that this case be, and the same is hereby referred to the auditor, with directions to state an account or accounts, in pursuance of the foregoing agreement and of this order.

After which the auditor made up a report, as of the 8th of November, 1827, which he filed on the 15th of the same month, in

(e) Anonymous, 1 Salk. 153; *Carter v. Barnadiston*, 1 P. Will. 518.—(f) *Curtis v. Candler*, 6 Mad. 123.

which he says that he had stated and therewith returned accounts A and B, between each of the defendants, as an executor, and the estate of *Larkin Shipley*, deceased; and also account C, between said estate and the complainants *Jones* and wife; that there was a balance in the hands of *Wayman* of \$51 68, and in the hands of *Stockett* of \$145 95; and that there was due to *Jones* and wife, on account of interest on their legacy, the sum of \$144 01. The auditor further says, that he had allowed *Stockett* credit for the sum of \$50, a fee to counsel retained by him to defend that suit.

The defendant *Stockett* excepted to the accounts A and B, because in said accounts the defendant *Wayman* was allowed one-half of the commissions heretofore allowed to this exceptant by the Orphans Court; and he excepted to the account C, because the complainants were thereby allowed interest on their legacy from the time of the death of the testator; whereas interest ought not to be allowed until twelve months thereafter.

21st February, 1828.—BLAND, *Chancellor*.—The solicitors of the parties having been fully heard, the proceedings were read and considered. It is clear, that the allowance of commissions to executors, in all cases properly brought before an Orphans Court, is a matter as entirely within the jurisdiction of that tribunal as this; and in so far as it appears, that the matter of commissions had been adjusted and determined by the Orphans Court, as has been done in this instance, the judgment of that tribunal cannot be reviewed or reversed by this court. Therefore the first exception must be sustained.

This legacy, the annual interest and profits of which alone have been given to the plaintiff *Ann*, during her life, is only payable out of the personal estate of the testator; as to which it has been laid down as a general rule that, as the executors must be allowed a reasonable time to collect the estate, first to satisfy the creditors and then the legatees of the deceased, no such legacy shall carry interest until one year after the death of the testator. (g) And this general rule applies as well to annuities as to mere pecuniary legacies; for an annuity so given is a legacy, and therefore even if the donation to the plaintiff *Ann* be regarded as a mere annuity, although with propriety it cannot be in all respects so considered, still it falls under the general character of a legacy, and must in

(g) *Sitwell v. Bernard*, 6 Ves. 539; *Bourke v. Ricketts*, 10 Ves. 533.

this respect be governed by the same general rule. (*h*) Where a parent gives a legacy to a child, especially if the child has no other means of support, there, because of the duty of a parent as far as he can to provide a maintenance for his child, the legacy shall carry interest from the death of the testator; (*i*) and so too in all other cases, if such be the express declaration or manifest intention of the testator, the legacy shall bear interest from his death. But this legacy is given by an uncle to his niece and her children, and there is no intimation by the testator as to the time from which the legacy is to begin to bear interest, and therefore the second exception must also be sustained.

In regard to the fee here proposed to be allowed to the solicitor employed by the trustee, it has been with propriety laid down, that where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution of his trust, he is entitled not only to his costs, but also to his charges and expenses, under the head of just allowances. (*j*) For these reasons this fee may well be allowed.

Whereupon it is *Ordered*, that the said exceptions be ruled good, and that the auditor correct his statements accordingly.

On the 10th of March, 1828, the auditor reported, that he had corrected the accounts as ordered; that there was due from *Wayman* the sum of \$183 42; from *Stockett* \$9 79; and that *Jones* and wife had been overpaid their annuity to the amount of \$289 99.

After which, the trustees having brought in and deposited a further sum of money, it was, on the petition of the plaintiffs, ordered to be invested in stock of the Farmers and Mechanics Bank of Frederick County.

On the 15th of November, 1827, *Richard G. Stockett* and *Henry Wayman* filed their bill here against *Samuel Jones* of *Joshua*, and *Ann* his wife, and *Larkin Shipley*, an infant. This bill stated that the late *Larkin Shipley*, who was, at the time of his death, possessed of and entitled to considerable real and personal estate, by his will gave a legacy to this defendant *Ann*, and the residue of his estate to this defendant *Larkin* in the manner therein mentioned, and in-

(*h*) *Hume v. Edwards*, 3 Atk. 693; *Nannock v. Horton*. 7 Ves. 401; *Sibley v. Perry*, 7 Ves. 534; *Franks v. Noble*, 12 Ves. 485.—(*i*) *Crickett v. Dolby*, 3 Ves. 13; *Chambers v. Goldwin*, 11 Ves. 1.—(*j*) *Webb v. Shaftesbury*, 7 Ves. 481; *Fearn v. Young*, 10 Ves. 184; 2 Fonb. 176; *Brocksopp v. Barnes*, 5 Mad. 90.

voked into this case the before-mentioned proceedings, under the bill filed by these defendants *Jones* and wife against these plaintiffs; which case had been referred to the auditor, who had stated several accounts. But that this defendant *Larkin*, not being a party to those proceedings, or bound thereby, might, at any future period, impeach the correctness of the accounts of these plaintiffs, which had been approved in that case; that, owing to peculiar circumstances, to the localities of the property of the testator, and to the residence of these plaintiffs, and the *cestui que trusts*, a division of the trust property, and of the duties of these plaintiffs, was desirable, so that the plaintiff *Stockett* might have the management of the fund invested for the benefit of this defendant *Ann*, and that the residue of the estate might be confided to the plaintiff *Wayman*. Whereupon, the bill prayed for such decree as the court might deem just.

On the 24th of December, 1827, *Jones* and wife filed their answer to this bill, in which they admit the will and proceedings in the suit instituted by them, and say, that, in consequence thereof, a portion of the legacy of \$7,000, to wit: the sum of \$3,552, or thereabouts, had been brought in and invested, although not expressly asked or required to be brought in; that they were extremely anxious to have the balance brought in and invested, as should be recommended by them, who were alone interested therein; but objected to the separating of the joint trust reposed in the plaintiffs relative to the said bequest; at all events, not until the whole sum should have been invested in a manner satisfactory to these defendants.

On the 26th of March, 1828, the infant defendant *Larkin* answered by his guardian *ad litem*, that he was unacquainted with the facts stated in the bill, and prayed the protection of the court.

On the 31st of July, 1828, *Larkin Shipley*, then an infant, by *John Shipley*, his guardian and next friend, filed his bill against *Richard G. Stockett*, *Henry Wayman*, and *Samuel Jones of Joshua*, and *Ann* his wife. This bill states that the late *Larkin Shipley* made his will, &c. as before stated, which proceedings in the suit of *Jones* and wife, against *Stockett* and *Wayman*, he exhibited and prayed, might be taken as a part of this his bill; that this plaintiff *Larkin* was still an infant under the guardianship of his father *John Shipley*, who was unable out of his own funds, suitably to maintain and educate him; that during a short period, after the death of the testator, the defendants *Stockett* and *Wayman*, had advanced to the father and guardian of this plaintiff small sums for his maintenance and education, but

have latterly refused to make any further advances, whereby he has been unjustly deprived of the most important benefit intended for him by the testator; that there were sundry debts due to the testator, which the defendants *Stockett* and *Wayman* had neglected to sue for and collect; and, amongst others, a debt due from the defendant *Stockett*, secured by mortgage for \$3,186, with interest from the 5th of May, 1811, payable annually; which interest had not been accounted for. Whereupon, the bill prayed that the trustees might be ordered to render a true account of the management of the trust fund; that they might execute the trust; that the residue of the legacy to this defendant *Ann* might be invested; and the residue of the trust property ascertained and invested in some productive fund, and the rents of the lands, and the interest of the money paid over to the guardian of this plaintiff, for his maintenance and education; that the said trustees might be ordered to collect immediately all debts due to the testator, the interest of which was not punctually paid annually, and be compelled to pay interest on all sums improperly retained in their hands, and to give security for the faithful performance of their trust, and that the plaintiff might have such other relief as the nature of his case might require.

It appears, from a certificate of the register of wills of Anne Arundel county, that *John Shipley* had, on the 27th of July, 1828, given bond as guardian of *Larkin Shipley*.

On the 22d of September, 1828, the defendants *Jones* and wife put in their answer to this bill, and admitted the before-mentioned facts and proceedings, as therein stated, and prayed that the mortgage of the estate of the defendant *Stockett* might not be considered as a part of the legacy given to them, but that the trustees might be ordered to collect the estate of the testator, and make an investment of the balance of their legacy, giving to them an opportunity of making a suggestion of what might appear to them to be fit and proper objects of investment, they being alone interested in the said investment. And they say that they are willing that the balance of their legacy may be brought in and invested as before directed, although the bringing in of the sum of \$3,552, as before stated, into this court, was not only not prayed for by these defendants, but was contrary to their wishes, and occasioned to them a loss of five months interest, as aforesaid; and that the course taken heretofore by this court, without the desire, and to the disadvantage of these defendants; is now prayed for and requested; because it will be more satisfactory and safe, and there will be no probability that the same may not be promptly invested.

On the 20th of October, 1828, these defendants *Stockett* and *Wayman*, by their petition, prayed that this defendant *Samuel Jones* might be appointed trustee in their place, of the legacy of \$7,000, and that the amount might be paid into his hands as such, to be held and disposed of by him, under the direction of the court.

On the 27th of October, 1829, the defendant *Wayman* filed his answer, in which he admitted as before the facts, as stated in the previous proceedings, and prayed that those proceedings might be taken as a part of this, his answer. He then set forth the reasons why some of the debts due to his testator had not been sooner collected, and why some of them still remained to be got in; and he then further stated, that the plaintiff *Larkin* was then an infant, about twelve years of age, and lived with his father, who could not require that any portion of the profits of the estate should be applied to the support of the plaintiff; that, as was intended by the testator, he had placed the plaintiff at a school, when he was old enough, and continued him there until his father took him away; and he was not then at any school; that the father was not entitled to have any part of the rents and profits of the testator's estate paid to him for the support of his own child, or while he refused to permit the child to receive the education intended to be given to him by the testator. And, therefore, this defendant had for some time declined to pay any thing to the father, conceiving that, if he were to do so, it would not be applied according to the intention of the testator.

On the 28th of October, 1828, the defendant *Stockett* put in his answer, in which he prays that the former proceedings may be taken as a part of this, his answer, and admitting the facts which he had therein admitted, says that he is indebted by mortgage, as stated in the bill, and that he is ready and willing to account, &c.

To these answers the plaintiffs put in a general replication, and a commission was issued, under which testimony was taken and returned, from which it appeared that the pecuniary circumstances of *John Shipley*, the father of the plaintiff *Larkin Shipley*, were such that he was unable to give to his son even a common country school education, without labouring under some inconvenience with regard to the rest of his family. After the return of this commission, these four cases were together brought before the court.

5th November, 1829.—BLAND, Chancellor.—These cases standing ready for hearing, and having been argued by the counsel for the complainant *Larkin Shipley* of *John*, and the defendants

Stockett and *Wayman*, it is thereupon, with the consent of the parties, *Decreed*, that these cases be, and they are hereby consolidated, and that the said defendants *Richard G. Stockett* and *Henry Wayman* account with the complainants in the premises. It is further *Decreed*, that these cases, so consolidated, be, and they are hereby referred to the auditor to state the accounts, and to inquire whether any, and what allowance shall be made, and to whom, for the maintenance and education of the complainant for the time past or to come; and that he take any testimony adduced by either party relating to the said matter. It is further *Decreed*, that the defendants *Richard G. Stockett* and *Henry Wayman* make a full and particular report of their proceedings, as trustees under the will of *Larkin Shipley*, deceased, setting forth what debts due the deceased they have collected, and when; specifying the amount of principal and of interest and costs separately, and what investments they have made of the same, or of any other funds of the deceased in their hands; and that they bring into this court any securities, or evidences of loans, or investments of any of the said funds, and the vouchers for any expenditure heretofore allowed them by this court, or the Orphans Court of Anne Arundel county. And it is further *Decreed*, that the said *Richard G. Stockett* and *Henry Wayman*, on or before the fifteenth day of November next, file, in this court, a bond or bonds, with surety to be approved by the Chancellor, in the penalty of \$20,000, with condition for the faithful discharge of the trusts reposed in them by the will of the said *Larkin Shipley*, deceased.

After which, the auditor made up a report, as of the 30th of November, 1829, which he filed on the 4th of December following, in which he says that *Stockett* and *Wayman*, and the solicitor of *Shipley*, had appeared before him; that *Wayman* had filed his report and vouchers, with an agreement signed by the parties, and that *Stockett* had also filed his report, from all which, and the proceedings, as directed by the decree of the 5th of November, he had stated, *first*, an account between *Wayman* and the estate of the testator, from which it appeared that *Wayman* had in his hands the sum of \$3,105 75; *second*, an account between *Stockett* and the said estate, in which he was charged with the arrearages of interest on his mortgage to the testator to this date; leaving a balance in this executor's hands of \$827 04; *third*, an account between the said estate and *Jones* and wife, of their principal legacy and interest thereon. From which, it appears that, on account of the

principal legacy of \$7,000, the sum of \$3,552 has been invested, and the further sum of \$822 40 is deposited in court to be invested, leaving a balance of \$2,625 60 to be provided for; and that the sum of \$97 90 was due to *Jones* and wife for arrearages of their annuity to this date. The auditor further says, that the parties in their agreement annexed to the report of *Wayman* have assumed that the sum of \$150 per annum would be a reasonable allowance for the maintenance and education of the infant *Larkin* from the death of the testator; and under the circumstances the auditor was inclined to adopt the estimate. The infant *Larkin* was admitted to be about twelve years of age, and excluding some small balances due, the amount of which could not be exactly ascertained, the residue of the personal estate, bequeathed to the said *Larkin*, might be assumed to consist of,

The mortgage debt of <i>Richard G. Stockett</i> ,	. . \$3,186 00
Balance as cash in his hands,	 827 04
Do. in the hands of <i>Henry Wayman</i> ,	. . . 3,105 75
Principal debt due from <i>Elisha Brown</i> , of <i>Samuel</i> ,	
and <i>Samuel Brown</i> , junior,	 437 00
	7,555 79
Which is charged with the balance of the legacy	
bequeathed to <i>Mrs. Jones</i> and children,	. . 2,625 60
Clear balance,	 \$4,930 19

The estate bequeathed to *Larkin Shipley*, including a real estate which then rented for \$36, might therefore be safely estimated to yield two hundred and fifty dollars per annum. The auditor moreover says, that it also appeared from the agreement aforesaid, that the said *Larkin* had been maintained and educated by his father, *John Shipley*, from April, 1827, to the present time; for which the proper allowance at the rate aforesaid, would be \$393 75. And that he had received on account \$70; leaving a balance due of \$323 75. And in addition to the said balance, the said *John Shipley*, as next friend, claims to be re-imbursed his legal costs of suit, and also, the sum of \$40 as an additional fee to his solicitor, which was in the opinion of the auditor a reasonable fee.

The plaintiff, *Larkin Shipley*, excepted to the account of the trustee *Stockett*, designated by the auditor as the *second* account. And also to the auditor's account, filed on the 15th of November, 1827, in the case of *Jones* and wife, which by the interlocutory

decree of the 5th of November, had been consolidated with this case. 1. Because, in the account filed on the 15th of November, 1827, the expenditures and commissions of the said *Stockett*, were allowed out of the principal sums received by him; whereas, they ought to have been allowed out of the interest due on his mortgage annu-ally. 2. Because, in the *second* account, filed on the 4th December, *Stockett* was charged with simple interest on his mortgage; whereas, the interest being payable annually, ought to have been paid in the discharge of the annuity due to *Jones* and wife; or, otherwise laid out for the benefit of the estate, which not having been done, compound interest ought to be charged.

28th January, 1830—BLAND, *Chancellor*.—This case, as consolidated, standing ready for hearing, and having been submitted on the notes of the solicitors of the parties, the proceedings were read and considered.

The original plaintiffs *Jones* and wife, seem to have taken some very erroneous views of their case, which it may be well here to notice, lest improper inferences should otherwise be deduced from them. They have roundly affirmed, that *they alone were interested* in the investment of this legacy of \$7,000.

This positive and comprehensive allegation, to say the least of it, could only have proceeded from inattention to the express language of the will under which they claim; by which, it unequivocally appears, that although the testator says, I give to my niece *Ann Shipley*, the sum of \$7,000; yet he does so, upon the express condition, that no more than ‘the annual interest thereof, shall be paid to her yearly during her natural life.’ By which the testator, in this peculiar and mixed disposition of that amount of his estate, in effect, gave her nothing more than a legacy in nature of an annuity, constituted of only such profits as might be safely derived from \$7,000 so disposed of. (k) And consequently the plaintiff *Samuel Jones*, became entitled only, in right of his wife, to that indefinite annuity, during her life. But the testator directs, that, after her death, the \$7,000 shall go to her lawful issue; and therefore, her children by *Jones* and by any other husband stand alike and next in remainder; and on her leaving no lawful issue, to go over to others. Therefore, so far from the plaintiffs *Jones* and wife being *alone* interested in the investment, those in remainder have, by much, the largest interest in the safe disposition of this sum; so that the whole principal may reach them undiminished after the

(k) *Franks v. Noble*, 12 Ves. 490.

life interest, in its profits, shall have fallen in. But as the plaintiffs *Jones* and wife, have an interest in its being *most profitably* disposed of, compatibly with its ultimate safety, it was obviously proper that they should be consulted so far, and to that extent; and they were so heard accordingly. But the court considered itself bound to act as the *ex officio* guardian of the interests of those who are to take in remainder; and who may not be now in existence, or if they are, having no present vested right, could not be made parties to this suit. It is therefore perfectly clear, that *Jones* and wife are not *alone* interested in the investment of this sum of money.

The plaintiffs *Jones* and wife, have also affirmed, that they did not expressly ask or require the \$7,000 to be brought in; and that the doing so, was not only not prayed for by them, but was contrary to their wishes, and had occasioned to them a loss of five months' interest.

But, by their bill, filed about eighteen months after the death of the testator, they complain, that the executors had not paid them all to which they were entitled; that they had suffered the money to remain unproductive in their hands, and had failed to execute their trust—whereupon the bill prayed, that the trustees might account, and especially, that they should be required to put the \$7,000 out at interest, so as to have it made productive to the plaintiffs. *Jones* and wife, thus expressly made it a ground of complaint, that the money remained idle in the hands of the trustees; and also expressly prayed for the direction of the court to the trustees as to the investment. The defendant *Stockett*, at the very next term after that to which he had been summoned; and as soon as he could have been compelled, or was expected to appear and answer, put in his answer, submitted to account immediately, and to such directions as the court should give in relation to the investment; and in a few months thereafter, offered to bring into court a large amount applicable to the trusts of the will; and asked for the direction of the court as to the disposition of it; which money was thereupon ordered to be brought in and deposited, subject to further order. The ground of complaint against the trustee *Stockett*, was therefore, without delay, removed both in word and deed; and a part, at least, of the subject was placed in a condition to have the prayer of the plaintiffs *Jones* and wife, granted at any moment when they should move, so as to enable the court to act with a due regard to the interests of all concerned.

It has been long, and well settled, that in all cases where property has been vested in a trustee; or placed in his hands; or put under his control for the purpose of securing it for the benefit of any one; or to insure its proper application in any legal way as prescribed by the owner, that although such trustee may, in almost all cases, if he thinks proper, take upon himself the risk of properly executing the trust without assistance from any quarter; yet he is not absolutely bound to do so. He may in all cases where the nature of the trust is governed by principles of equity, as most commonly happens, ask the direction of a Court of Chancery; and act under the indemnity of its decree; not because such a court is, in itself, considered as a proper or suitable agent for the mere safe-keeping, or management of any property; but because where property has been put into a particular course, allowed and regulated only by principles of equity, it is fit and proper, that all who have a beneficial vested interest in it; as well as the agent to whose management it has been confided, should have an opportunity of coming before a tribunal whose peculiar province it is to apply such principles; and have such property so regulated; as well that those who may be then, or thereafter beneficially interested, may sustain no loss, as that the trustee may fall into no mistakes, nor be subjected to any unreasonable responsibility in cases, where the rules of equity, by which his administration must be governed, are complex and of difficult application. And therefore it is, that in all such cases, where a trustee comes before a court of equity, as a plaintiff, or is brought before it as a defendant, and declines to execute the trust without the direction and indemnity of the court, he is held to be so entirely justifiable in thus seeking its protection, that he is never charged with interest or costs; and that all such losses and expenses are directed to be borne by the particular trust fund in regard to which the direction has been required. (*l*)

Now in the case under consideration, the plaintiffs *Jones* and wife, had complained, that these trustees had suffered the trust fund to remain in their hands unproductive; and one of the trustees, for they cannot act separately, (*m*) came in at once, submitted to,

(*l*) *Leech v. Leech*, 1 Ch. Ca. 249; *Brown v. Litton*, 1 P. Will. 140; *Trafford v. Boehm*, 3 Atk. 448; *Brooks v. Reynolds*, 1 Bro. C. C. 183; *Hancom v. Allen*, 2 Dick. 498; *Brown v. Yeale*, 7 Ves. 50, note; *Curteis v. Candler*, 6 Mad. 123; *David v. Frowd*, 7 Cond. Cha. Rep. 8.—(*m*) *Nicolson v. Wordsworth*, 2 Swan. 370; 2 Fonb. 181.

and prayed the direction of the court as to the mode of executing the trust—whence it was clear, that no investment could be made until directed by the court; and, as in that interval the trustees could not be charged with interest, no profits, to which alone *Jones* and wife were entitled, could have been derived from the \$7,000. But *Jones* and wife had themselves complained, that to suffer the legacy to remain in the hands of the trustees would put at great hazard the principal sum; and consequently, the interest thereon; indeed, it was obvious, that the entire value of their interest in the sum of \$7,000, depended altogether upon its being immediately placed in safety; and, as soon thereafter as it might be judiciously done, profitably invested. It therefore clearly followed, that although *Jones* and wife had not, in so many words, prayed, that the legacy of \$7,000 should be brought into court; that nevertheless, it was the necessary result of the actual complaint and prayer of their bill, and most emphatically so after they had been informed by the answer of *Stockett*, that the trustees declined to execute their trust without the direction and indemnity of the court; for then the bringing of the money into court was the most direct and suitable answer which could have been given to their complaint; and the best step which could have been taken in their behalf, as preparatory to that investment for which they especially prayed. But it would seem from their answer, and the petition of the trustees, filed on the 20th of October, 1828, that they had had other objects in view; and that they had been thwarted in their expectations by the order of the 21st of September, 1825.

The trustee *Stockett*, in his report in answer to the order of the 20th of January, 1826, seems to have misunderstood the Chancellor; and to have formed an inadequate notion of his own situation. If by an *interest* in the matter, he means a pecuniary benefit, it is certain, that he not only has no interest adverse to that of *Jones* and wife, but none whatever in opposition to any one else. But, as trustee he holds an important office; and he has duties to perform which have a direct bearing as well upon the interests of *Jones* and wife as upon all others who may take in remainder after them. And consequently, when he comes, or is brought here, in respect of that office and those duties, although he may with propriety claim the direction and indemnity of the court, he cannot be justified in simply casting the whole matter before it, and leaving it to act blindly without information, or upon mere presumptions. He is one of the fiduciaries of this property, chosen by

the late owner, as a trustworthy agent for conducting it along a prescribed line; in regard to which the court always expects to hear from him; and, when he stands blameless, hears him with favour and confidence. Therefore, when such a trustee asks the assistance and protection of the court, in the execution of his trust, it is his duty to give the court all the information in his power, in order to enable it to give directions most suitable to the true nature of the case, and such as may be alike beneficial to all concerned. (n)

Passing from the consideration of these matters in relation to the legacy given to the plaintiff *Ann* for life with remainder over, it will be seen, that there has been admitted into this case, as now consolidated, a new plaintiff, *Larkin Shipley*, another legatee under this same will, claiming a legacy of a similar kind; and which therefore, must, in so far as the two legacies are substantially alike, be governed by the same directions that have been given in relation to the legacy bequeathed to the plaintiff *Ann*. But in regard to the legacy to the plaintiff *Larkin* other questions have arisen, from his infancy and peculiar situation, which call for other and further directions to the trustees as to the disposition, in some respects, of the legatee himself as well as of his legacy.

The directions of the testator are clear and explicit, 'that my said trustees shall have and retain the sole possession and custody of the said estate so given as aforesaid to my said nephew *Larkin* for the purpose of educating him, and are to rent out the real estate, and put out the money on interest to the best advantage; and pay away the yearly proceeds after his arrival at age to him; but to retain a control over the principal till the objects of this bequest and devise are fully complied with.' Hence it is manifest, that to these trustees alone have been confided the means of accomplishing the laudable intentions of this testator.

Where a large legacy is given to an infant, and it vests in him immediately, or ultimately at all events, it has been usual to allow an adequate maintenance out of the property so given, and to order it to be paid to the father for that purpose, if he should not be of sufficient ability to maintain his child in a manner suitable to the fortune so given. (o) But in this case the bequest is special and peculiar. The probable or possible misapplication by the father of the proceeds of the property bequeathed to this infant,

(n) *Walker v. Symonds*, 3 Swan. 58; *Winder v. Diffenderffer*, ante 174.—(o) *Buckworth v. Buckworth*, 1 Cox, 80.

seems to have been distinctly within the contemplation of the testator. For the trustees are expressly directed to retain the sole possession of the property for the purpose of educating the infant; and there is no provision for his maintenance, except, as an indispensable means of educating him; that is, while he may be at school, and not residing with his father. The distinctly expressed intentions of the testator are that the infant be educated; that so much of the yearly proceeds of the property as may be necessary are to be applied for that purpose; and that all over and above what may be necessary to attain that object shall be put out on interest to the best advantage, and paid to him after his arrival at age; or, in other words, that if, from any cause, he cannot be educated as desired, he shall have the money which might have been spent in that way.

It is clear, that upon mere common law principles, and by means of a writ of *habeas corpus* alone, the Chancellor, the judges, or the courts of common law can do little more than relieve any one from illegal restraint. (*p*) The Chancellor, however, not only has the power, by *habeas corpus*, to discharge any one from illegal confinement, but he has had delegated to him, as representing the state in its capacity of *parens patriæ*, the power to provide, according to law, for the safety and proper treatment of infants who are unable to take care of themselves. (*q*) It was only as to the extent of this large parental authority of the court, that I had entertained some doubts. (*r*) My first impression was, when this case was opened before me, that this court could not, for any purpose however apparently laudable, deprive a father of the care and custody of his infant children; thrown upon him by the law, not for his gratification, but on account of his duties to them, with reference to the public welfare, and place them against his will in the hands of another. (*s*)

But, upon a more careful investigation, I find, that although it is admitted to be always a delicate thing for the court to interfere against the parental authority, yet that it will do so when it becomes necessary for the safety, protection, and obvious benefit of the infant. The court founding its judgment in such cases, as in those between husband and wife, upon an admission that the tie

(*p*) *Lyons v. Blenkin*, 4 Cond. Cha. Rep. 120; *Ex parte Skinner*, 17 Com. Law Rep. 122.—(*q*) *Wellesley v. Beaufort*, 3 Cond. Cha. Rep. 10; 2 Fonb. 226.—(*r*) 2 Lond. Jurist, 66.—(*s*) *St. John v. St. John*, 11 Ves. 531.

which binds them together cannot be severed by it; but, yet that a partial or a temporary separation has become necessary for the protection of the weaker or defenceless party; and thus, so far, allowing a stronger policy to over-rule a weaker one. (*t*) The court will not permit the colour of parental authority to work the ruin of the child, or suffer the child to be sacrificed in any way to the views of the father. (*u*) And therefore, where the father was infamously profligate and vicious in his habits, and course of conduct; or had attempted to associate his infant children with a lewd woman he had brought into his house; or was guilty of gross ill treatment and cruelty towards them, they were removed from his custody. (*w*) But the father has no right to the custody of his

(*t*) *Westmeath v. Westmeath*, 4 Cond. Cha. Rep. 62.—(*u*) *Butler v. Freeman*, Amb. 302; *Creuze v. Hunter*, 2 Cox, 242; *Lyons v. Blenkin*, 4 Cond. Cha. Rep. 115.—(*w*) *Ex parte Warner*, 4 Bro. C. C. 101; *Skinner v. Warner*, 2 Dick, 779; *De Manneville v. De Manneville*, 10 Ves. 61; *Whitfield v. Hales*, 12 Ves. 492; *Ball v. Ball*, 2 Cond. Cha. Rep. 299; *Wellesley v. Beaufort*, 3 Cond. Cha. Rep. 1; *The King v. De Manneville*, 5 East. 221.

PRATT v. PRATT.—William Pratt, an infant of eleven years of age, by Christopher Cross Routh, his uncle and next friend, on the 6th of February, 1773, filed his petition in this court, in which he stated, that John Pratt, his father, had married Mary Buck, by whom he had issue, the petitioner his eldest son, and several other children; that she afterwards died seized in fee of divers lands, leaving the petitioner her eldest son and heir at law; that the petitioner's father afterwards married Elizabeth Griffith; and on the 21st of November, 1770, made his last will, in which, among other things, he devised as follows, to wit: 'I bequeath unto my son William Pratt one negro girl named Beck; and it is my will and desire, that my beloved wife Elizabeth Pratt should have the bringing up of my said son William Pratt, and that he should live with her until he shall be of the age of twenty-one years, and that my said wife should have possession of my dwelling plantation until my aforesaid son William shall arrive at the age aforesaid. All the remainder of my personal estate, after paying my just and lawful debts, and the above legacies, I give and bequeath to be equally divided among my children. And I do hereby nominate and appoint my beloved wife Elizabeth Pratt executrix of this my last will and testament.' That afterwards John Pratt, the petitioner's father, died seized and possessed of other lands than were devised by the said will, which have descended to the petitioner his heir at law. That after the death of the testator, the said Elizabeth proved the will and took upon herself the execution thereof, and also the guardianship of the petitioner. That she hath been extremely remiss as executrix and guardian, whereby the estate of the testator hath been much wasted and embezzled; and the petitioner neglected and in want of the common necessities of life; nor hath she paid the least attention to his education. That such hath been her conduct since the death of the testator, which the petitioner hopes there may be no necessity particularly to expose, that she has lost all the respect of her neighbours and acquaintances, and by them is esteemed a woman of an infamous character. That she had endeavoured secretly to convey away sundry negro slaves and other personal estate of the testator with a view to defraud the petitioner and others,

bastard child; and it may be taken even from its mother, and placed beyond the reach of contamination from her vicious habits. But, as in thus separating parent and child, the only object is to protect the infant from the vices, the maltreatment, or the miscon-

the children of the testator, and to deprive her surety for the due execution of the will of the means to counter secure himself, he having on petition obtained an order from the County Court to possess himself of the estate of the testator in her hands. From all which the petitioner was truly apprehensive of his suffering greatly with respect to the profits of his real estate for which there was no security; and that his education would be totally neglected. Whereupon he prayed, that, as the said Elizabeth had disqualified herself to be his guardian, he might be removed from her custody, and have another guardian assigned for him, or have such other relief as might seem meet and agreeable to justice. To this petition there was subjoined an affidavit of the next friend of the truth of its allegations, made before a justice of the peace.

6th February, 1773.—EDEN, Chancellor.—*Ordered*, that the same Elizabeth Pratt appear in the High Court of Chancery on Monday, the twenty-second day of this instant, February, to shew cause, if she hath any, why the said William Pratt, with his estate, should not be removed from the custody and guardianship of the same Elizabeth, and some other guardian be assigned for him. And that the said Christopher C. Routh also appear at the same time and place, and bring with him the aforesaid William Pratt; and then and there produce testimony to prove and establish the several allegations of the said petition; and that a copy of the same petition and this order be served on the same Elizabeth Pratt five days next preceding the said twenty-second day of this instant, February.

Copies having been served as directed, the case was again brought before the court.

17th April, 1773.—EDEN, Chancellor.—Upon consideration of the said petition; and the same Elizabeth Pratt having been properly served with a copy of the said petition and the order thereon; and the said Christopher C. Routh being present with the said William Pratt, and having fully proved and established the several allegations of the said petition. It is hereby *Ordered* and *Decreed*, that the said William Pratt, with his estate, be removed from the custody and guardianship of the same Elizabeth Pratt, and that the custody, guardianship and care of the same William Pratt, with his estate, be and is hereby committed to the same Christopher Cross Routh, the said Christopher C. Routh giving security to account for the profits of the estate of the said William Pratt according to such orders as shall from time to time be made by the Chancellor of this province for the time being, and to the same William Pratt when he shall arrive at the age of twenty-one years, and his executors and administrators, deducting thereout what may be sufficient for the maintenance and education of the same William Pratt, without diminution of the principal; and conduct himself by and pursue and keep the orders and directions of the acts of assembly of this province relative to guardians who are either appointed by the respective county courts of this province, or therein chosen by orphans, where the same shall not be inconsistent with or repugnant to the orders from time to time of the Chancellor for the time being.

After which C. C. Routh gave bond as required, &c.—*Chancery Proceedings, lib. W. K. No. 1, fol. 134.*

duct of the parent, every affectionate and tender feeling which should subsist between them will be sustained and cherished as far as practicable; and, for that purpose, they will be allowed to visit each other as often as may be compatible with the safety and good morals of the infant. (x)

Apart, however, from any positively vicious conduct of a father which might, of itself, afford a sufficient ground for having him separated from his children, a parent cannot be allowed, capriciously, to disappoint the just hopes and expectations of his child. For, although it is, by law, the duty of a parent to maintain his child, yet, where the father was in very indigent circumstances, and the child had had given to him a large fortune, such parent was not allowed to prevent the child from being maintained and educated in such manner as his fortune could well afford, and with the advantages he was thus justly entitled to expect; (y) or where the father takes a benefit under the will, by having a legacy given to himself, and also in consideration of a large legacy given to his child, consents that her maintenance and education shall be given up to the management of trustees. (z)

But, although it may be admitted that this jurisdiction of the Court of Chancery, as between parent and child, has been substantially established, yet it cannot be denied that there are many cases in which it would be exceedingly difficult to exercise such authority successfully, and with real advantage to the infant. (a)

In the case under consideration there is no evidence whatever of any vicious habits, or improper treatment of the father towards the legatee, or any other of his children; nor does there appear to have been any such great pecuniary difference made by this legacy between this legatee and his father, as in any respect to call for a check upon the parental authority for the benefit of the infant. The father, we must presume, from the proofs, is an industrious labouring citizen, with a large family about him; who has not the means of bestowing any thing more than what is called a common country school education upon any of them. His son *Larkin*, the

(x) *The King v. Soper*, 5 T. R. 278; *The King v. Hopkins*, 7 East. 579; *Strangeways v. Robinson*, 4 Taunt. 509; *Ex parte Hopkins*, 3 P. Will. 155; *Lyons v. Blenkin*, 4 Cond. Cha. Rep. 124; *Prather v. Prather*, 4 Desau. 39; 2 Lond. Jurist, 76.—(y) *Beaufort v. Berty*, 1 P. Will. 705; *Ex parte Hopkins*, 3 P. Will. 154; *Powel v. Clever*, 2 Bro. C. C. 510; *Butler v. Butler*, 3 Atk. 60; *Creuze v. Hunter*, 2 Cox, 242; *Lyons v. Blenkin*, 4 Cond. Cha. Rep. 124.—(z) *Lyons v. Blenkin*, 4 Cond. Cha. Rep. 124.—(a) 2 Lond. Jurist, 66.

legatee, has had given to him an estate in the nature of an annuity for life, amounting to no more than \$250 per annum ; from which alone, it is true, that he may be able to obtain a much better education than his father can give him ; yet his expectations in life, from such an estate, cannot be presumed to rise so far above those to which he might look as a member of his father's family, as to suggest the propriety of his being brought up with higher hopes, much less to justify any suppression of his father's authority over him. Nevertheless, from the terms of this bequest, which, beyond a specified expenditure, is to accumulate until the legatee attains his full age, as well as from the principles of equity by which this case must be governed, if the father refuses to permit these trustees to have the management of his maintenance and education, I can order nothing to be paid to him for those or any other purposes. (b) And as the father has never, in any way, consented to part with his son, in consideration of his being maintained and educated, as directed by the testator, I cannot, on that ground, interfere with the connexion between him and his child. But to whatever school he may be permitted to go, by his father, the trustees will be ordered to pay all expenses, to the extent of the annual income of his legacy, including maintenance for that purpose, if the school should be deemed sufficient, and happens to be too distant for him to reside with his father.

There seems to have been an understanding between these trustees and the father of *Larkin*, the legatee, that he was, at all events, to be maintained and educated by them ; and, under that impression, they have made some advances to the father on that account. I shall, therefore, on the ground of allowing that to stand which appears to have been well intended, and might have been ordered, affirm the auditor's report, in this respect, awarding so much, as therein stated, to be paid to the father.

Trustees are never charged, in any way, but on the ground of some fault or neglect. Here no misconduct can be imputed to these trustees ; and, therefore, the plaintiff *Larkin Shipley's* exceptions to the auditor's report must be over-ruled.

Whereupon it is *Decreed*, that the trustees *Richard G. Stockett* and *Henry Wayman* without delay invest the residue of the amount of the legacy given to the said *Ann Jones* in such stocks or way

(b) *Jervoise v. Silk*, Cooper's Rep. 52 ; *Haley v. Bannister*, 4 Mad. 275 ; *Wellesley v. Beaufort*, 3 Cond. Cha. Rep. 14.

as may be suggested by the said *Jones* and wife as heretofore allowed; and that the investment be made in the names of the trustees as directed by the order of the 20th of January, 1826. And it is further *Decreed*, that the trustees *Richard G. Stockett* and *Henry Wayman* apply the yearly proceeds of the property devised and bequeathed by the testator *Larkin Shipley* to his nephew *Larkin* to his education only so long as he may reside with his father. But, that the trustees, with the permission of the father of the infant *Larkin Shipley*, without delay, place him at some good grammar school in this state, there to be educated as directed by the testator until the further order of this court; and that the said trustees pay all the expense, as well of his maintenance as of his education at such grammar school, if the said infant should not reside with his father, out of the annual income of his property so as aforesaid given to him. And it is further *Decreed*, that subject to, and excepting the applications of the yearly proceeds herein before directed, the said trustees without delay invest all the moneys so as aforesaid given unto the said infant *Larkin Shipley*, as well the principal thereof as all accumulations of interest, dividends, rents, issues and profits arising from the property so devised and bequeathed; which have been or may hereafter be collected, accrue and come to their hands, exclusive of the principal sum secured by the said mortgage executed by the said *Richard G. Stockett*, which is hereby declared to be an investment for so much, in the stock of The Farmers Bank of Maryland; or in the stock of some one of the banks of the city of Baltimore which have been incorporated by the laws of this state; the said stocks to be transferred unto and held by and in the name of the said trustees or the survivor of them for the uses, intents, and purposes in the will in the proceedings mentioned; the interest or dividends thereon, as the same may become due and be collected, shall be applied as herein before directed. And it is further *Decreed*, that the reports of the auditor, so far as regards the accounts of the said trustees; and also in so far as the same accords in other respects with this decree be and the same are hereby ratified and confirmed; and so far as the same, with the exceptions thereto, may be at variance with this decree the same are hereby rejected and over-ruled. And it is further *Decreed*, that all the costs of these suits and proceedings to be taxed by the register, except where such costs have been otherwise directed to be paid by any previous order, be paid by the said trustees, and deducted, in due proportion, from the

proceeds of the property of the said legatees, which have or may come to their hands.

On the 22d of February, 1830, the trustee *Wayman*, by way of report, brought into court the vouchers of three claims which he had held for the estate and legatees of his testator; and declining to give bond, as required by the decree of the 5th of November, 1829, said, that in conformity, as he believed, to the wishes of *Jones* and wife, recommended in his place *Joshua Jones*, of Frederick county. And *Jones* and wife, by their petition, filed on the 9th of March following, expressed their assent to the resignation of the trustee *Wayman*; and proposed, with the approbation of the court, that *Joshua Jones*, of Frederick county, should be appointed in his place. To which proposition the solicitor of the trustee *Stockett*, and of *Larkin Shipley*, the legatee, by their note in writing, expressed their consent. Upon which the matter was submitted.

20th March, 1830.—BLAND, Chancellor.—The petitioner is *Samuel Jones* of *Joshua*, that is, as it would seem, the son of this *Joshua Jones* of Frederick. If that be the case, then it appears, that after having failed to have himself appointed trustee of this legacy of \$7,000, and thus directly getting it into his own hands, he now, indirectly, seeks to attain the same object, by having it placed in the hands of his father. In answer to such movements I would say, in the language of one of England's most distinguished Chancellors, Lord Nottingham, 'I like not that a man should be ambitious of a trust when he can get nothing but trouble by it;' (c) and therefore declare, without any reflection on this *Joshua Jones* of Frederick, that he shall not, as trustee, meddle with this trust.

It is true, that this court may, for just cause, remove a trustee and appoint another in his place; as where the trustee had become, by reason of age or infirmity, unable to attend to his duties; (d) or where a *feme sole* trustee had married a foreigner; for, although a *feme covert* is not incompetent to officiate as a trustee, yet there is much inconvenience in her doing so, and especially when she may, as the wife of a foreigner, be taken out of the state; (e) or where the trustee had gone abroad to reside; (f) or had absconded on a charge of forgery; (g) or had been guilty of a breach

(c) *Uvedale v. Ettrick*, 2 Cha. Ca. 131.—(d) *Hibbard v. Lambe*, Amb. 309; *Bennet v. Honywood*, Amb. 710.—(e) *Lake v. De Lambert*, 4 Ves. 593.—(f) *Buchanan v. Hamilton*, 5 Ves. 722.—(g) *Millard v. Eyre*, 2 Ves. jun. 94.

of trust; (*h*) or even where his co-trustees, there being several others, had a great aversion to act with him. (*i*) The court may also appoint a new trustee in the place of one who declines to act. (*j*) But if the deed or will should even expressly clothe a trustee with a discretionary power to appoint a new one, still the court will not permit him to do so, without its sanction; it not being a sufficient answer to say, that the court will take care to prevent the consequences; the mischief is, in a great measure, done by the appointment; the necessity of getting back the legal estate. (*k*) The act of assembly has provided, that if any person shall die, leaving real or personal estate to be sold for any purpose, and shall not, by will, or other instrument of writing, appoint a person as trustee to sell or convey; or the person appointed shall die, or refuse to act, the Chancellor may appoint a trustee for such purpose. (*l*) But although a trustee, who had accepted the trust, may, by the consent of most of the *cestui que trusts*, and with the sanction of the court, because of his unwillingness to continue any longer in the office, be discharged, and another appointed in his place; yet the *cestui que trusts* must be fully apprised of his application to be discontinued. (*m*) And if it appears that the most interested, or greater part of them are not then in being, or are incompetent to consent, his request will not be gratified, since he cannot, by any act of his own, without communication with his *cestui que trusts*, denude himself of the character of trustee till he has performed his trust. (*n*)

Here, however, it does not appear that there is any just cause of complaint against these trustees; and the trustee *Wayman*, having voluntarily taken upon himself the trust, cannot now be permitted, at his pleasure, to abandon it; and there is no one competent to consent to his discharge on behalf of the infant plaintiff *Larkin Shipley* and his issue, and the *feme covert Ann Jones* and her issue, who are the principal, if not the only *cestui que trusts*.

The act of assembly declares, that in cases where trustees have been appointed by last will and testament to execute any trust, and any person interested in the execution thereof shall shew that

(*h*) *Ex parte Phelps*, 9 Mod. 357.—(*i*) *Uvedale v. Ettrick*, 2 Cha. Ca. 130.—(*j*) ——— *v. Roberts*, 1 Jac. & Walk. 251.—(*k*) *Webb v. Shaftesbury*, 7 Ves. 487; *Bayley v. Mansell*, 4 Mad. 226; *Southwell v. Ward*, 5 Cond. Cha. Rep. 409.—(*l*) 1785, ch. 72, s. 4.—(*m*) *Rex v. Simpson*, 3 Burr. 1467.—(*n*) *O'Keeffe v. Calthorpe*, 1 Atk. 18; *Crewe v. Dicken*, 4 Ves. 100; *Chalmer v. Bradley*, 1 Jac. & Walk. 68.

it is necessary for the safety of those interested, that the trustees should give bond and security, the Chancellor may order them to do so; and if they shall fail to comply, to displace them. (o) The decree of the 5th of November, 1829, which required these trustees to give bond, was passed with the express consent of their solicitors. But, as no application has, as yet, been made by any person interested to force them to do so, the requisition of the decree may, in this respect, be allowed to stand over as regards *Wayman*, the trustee *Stockett* having given bond, until such an application shall be made.

It is, therefore, *Ordered*, that the said *Henry Wayman* be, and he is hereby continued as trustee, according to the will of the said *Larkin Shipley*, deceased.

After which, various other proceedings were had, and sundry other investments made; and the plaintiff *Larkin Shipley* having attained his full age, the case was submitted for a final decree and directions. When, on the 24th of January, 1838, it was determined that the words 'issue of his body,' in the devise to him, were words of purchase; so that he took only an estate for life; and the trustees were directed, as before, to make investments accordingly.

TILLY v. TILLY.

An infant defendant brought into the presence of the Chancellor, who thereupon appointed for him a guardian *ad litem*.—Land, belonging to infants, sold, under the act of assembly, on the petition of some of them by *prochein ami*, and the appearance of the others, by guardian.—Such a peculiarly constituted suit does not abate by the death of any one of the infants.—Where lands are devised to an adult for life, such tenant for life may be treated as the actual pernor of the profits; but, in case of such a devise to infants, until they attain their lawful age, their guardian must take the profits and apply them according to the directions of the will.—Such a devise to several infants, for their maintenance, must be applied equally; and in greater proportions as some die, or the elder ones become of full age; and the same rule must govern the application of the gross sum for which the estate had been sold.—A person who had been absent, and not heard from for seven years, was presumed to be dead.—A trustee, appointed to make sale, cannot be permitted, without the previous sanction of the court, to apply the proceeds of the sale.—Where a person has two capacities for the purposes of justice, each capacity may be considered as a distinct person.

THIS bill was filed on the 27th of October, 1817, by *Edward Tilly*, *Horatio Tilly*, *Margaret Tilly*, and *Elizabeth Tilly*, infants

by *Nicholas Brewer*, their next friend, against *Lucretia Tilly* and *Sarah Tilly*. The bill states that *Richard Higgins*, on the 11th day of November, 1807, made his last will and testament, by which, so far as relates to this case, he devised as follows :

‘I give and bequeath unto my son *Joshua Clarke Higgins* and his heirs, forever, all that plantation whereon I now live, called and known by the name of Part of White Hall, and What you Will, except one hundred and fifty acres thereof, to be laid off at the discretion of the said *Joshua Clarke Higgins*, which said one hundred and fifty acres, including the house where *John O’Hara* lives, I give and bequeath to my said son, in trust to and for the separate use of my daughter *Elizabeth Tilly* for and during her natural life, and to and for the maintenance of the children of the said *Elizabeth Tilly*, until they arrive at the age of twenty-one, remainder to the said *Joshua Clarke Higgins* and his heirs for ever. If my said son *Joshua Clarke Higgins* shall purchase the plantation whereon *Jasper Edward Tilly* now lives for the use of my daughter *Elizabeth* for and during her natural life, and to and for the use of her children until they shall respectively arrive at the age of twenty-one, then the said one hundred and fifty acres to be the property of the said *Joshua Clarke Higgins* and his heirs for ever.’

And then, after some other devises and bequests, the testator further says, ‘It is my will, that the whole of my real and personal estate shall remain undivided, and undisturbed for and during the space of five years from the first day of April next, subject to the control and direction of my son *Joshua Clarke Higgins*, and in his possession, the proceeds to be applied to the payment of my just debts; and if there should be any surplus, the same to belong to, and be the property of my son *Joshua Clarke Higgins* for his care and trouble.’ And then, after one other disposition, the testator, in conclusion, says, ‘I do hereby constitute and appoint my son *Joshua Clarke Higgins* to be the executor of this my last will and testament.’ This will was duly attested by three witnesses, and proved in the Orphans Court of Anne Arundel county on the 22d day of December, 1807.

The bill further stated, that *Joshua C. Higgins* had departed this life; that *Jasper E. Tilly* had been appointed trustee for the benefit of the said *Elizabeth* and her children; that the said *Jasper E. Tilly* and *Elizabeth Tilly* were both dead, leaving these parties her children, all of whom were then under age; that *Nicholas Brewer* had been appointed trustee for them, and had taken upon himself

the trust; and that the said land was not in a state of improvement, such as to produce any advantage to these parties; but might be sold to the advantage of all concerned. Whereupon it was prayed that a decree might be passed for the sale of their interest, and that they might have such other relief as the nature of the case should require.

27th October, 1817.—KILTY, Chancellor.—The defendants *Lucretia* and *Sarah Tilly* being before me, and appearing to be infants under the age of twenty-one years, *Dennis Claude* is hereby appointed guardian to them for the purpose of answering on their behalf to the bill.

On the same day, the infant defendants put in their answer by their guardian *ad litem*, in which they say that they admit the facts stated in the said bill, and were willing that a decree should be passed according to the prayer of the bill.

27th October, 1817.—KILTY, Chancellor.—Decreed, that the interest of the parties in the land in the proceedings mentioned be sold, that *Nicholas Brewer* be appointed trustee for making the sale, &c. He shall then proceed to sell the said real estate, either entire, or in such parcels as he shall deem advantageous, either at public or private sale, after giving at least three weeks notice in some convenient newspaper, in the event of a public sale, of the time, place, manner, and terms of sale, which shall be that the purchaser shall give bond with approved surety, for paying the purchase money, with interest, within twelve months from the time of sale, &c. (a)

(a) This bill does not ask for a partition, and therefore could not have been sanctioned by the act of 1785, ch. 72, s. 12, or the act of 1794, ch. 60, or by any other course in relation to partition; if, indeed, the interest of these infants could have been made the subject of a suit for partition. It must, therefore, be considered, as it appears to have been, the first decree under the act of assembly, which declares, that where any infants are possessed of any real estate whatsoever, it shall be lawful for the Chancellor, upon the petition of the guardian or *prochein ami* of such infants, after summoning such infants, and their appearance by guardian, to be appointed by the Chancellor, upon the hearing and examination of all circumstances, and upon its appearing to the Chancellor that it will be for the interest and advantage of such infants to sell such real estate, or any part thereof, to order such lands, or any part thereof, to be sold upon such terms as the Chancellor may direct. That the proceeds of the sales shall be paid over to the guardians of such infants, to be invested in such public stock, or other permanent funds, as will, at least, net six *per centum per annum* at the time of the purchase, and as the Orphans Court of the county, by whom such guardians shall have been appointed, shall direct. That the surplus interest, after what may be necessary for the maintenance and education of the infants respectively, as it accrues,

On the 30th of July, 1818, the trustee reported that he had made a private sale of the unexpired term in one hundred and fifty acres of the tract of land called White Hall, namely, until the youngest child of *Elizabeth Tilly*, deceased, should arrive at the age of twenty-one years, unto *Joseph Evans*, who was entitled to the reversion, on the 28th day of October, 1817, for the sum of \$1,500, which sum is not to bear interest until the said *Joseph Evans* shall obtain the possession of the land, which is expected to be in December, or the first of January next. This sale, as thus reported, was finally ratified on the 15th of March, 1819.

On the 18th of November, 1829, *Berry Griffith* filed his petition in this case, in which he stated, that *Horatio Tilly*, one of the parties mentioned in the bill of complaint, was dead; that administration of his estate had been granted to the petitioner; and that the trustee *Brewer*, had received the purchase money for the interest on the land sold by him; and had failed to pay to the intestate of the petitioner, the share to which he was entitled. Whereupon the petitioner prayed, that the trustee *Brewer*, might be ordered to make a further report; to pay the petitioner the share due to his intestate; to bring the purchase money into court, &c.

18th November, 1829.—BLAND, *Chancellor*.—This petitioner comes as the administrator of one of the original parties. If this is to be regarded as a suit, in all respects analogous to an ordinary

shall be invested by such guardian, in such stock as aforesaid. That no part of the principal arising from the sale of any real estate, by virtue of this law, shall, in any wise be applied towards the maintenance or education of any infant, unless the Chancellor shall consider it necessary. That in case of the death of any such infants before their arrival at lawful age, or their death, without lawful issue, the proceeds of sale, or stock, shall be considered as real estate, and, as such, shall descend to those heirs who would be entitled to the said lands in the same manner as if the same had not been sold. And, that the Chancellor may exercise all the powers herein provided, in all cases where infants are seized of a *reversion*, dependent upon an estate for life, and upon the assent of the tenant for life for the sale thereof, to order the annual interest, or such part thereof as may be deemed equitable, to be paid over to such tenant for life, during his life.—1816, ch. 154.

It would seem that this act had been understood, and intended by the legislature, to embrace none other than legal estates of inheritance; because, apart from its general phraseology, of its expressly directing that the proceeds of the sale should, on the death of the infant, descend in the same manner as the land would have done; and because, by a subsequent enactment, it has been expressly declared that it should extend to equitable titles to real estates.—1818, ch. 193, s. 7. But the interest here directed to be sold was a mere use, determinable by the death or full age of the infants.

suit by one party, claiming adversely to another, then it is shewn, by this petitioner himself, to have abated by the death of one of the materially interested parties; and therefore, it cannot, in any way, be further proceeded in, until it has been regularly revived. But this is a special form of proceeding, sanctioned by the legislature, whereby a sale of the real estate of infants may be ordered, on its being shewn to the Chancellor, to be for their interest and advantage that it should be sold, and the proceeds of the sale invested in some public stock, or other permanent fund for their benefit. It is a form of judicial proceeding, which may be originated and prosecuted to a conclusion by a next friend, and a guardian of an infant, without the infant himself ever having had the least knowledge of it whatever. And therefore, it cannot be treated as an adversary suit, which abates by the death of an infant who was a party to the proceeding; since his heir, or representative comes in after his death, not to prosecute or defend an unsettled right, but merely to claim that, in a new form, the right to which had never been drawn in question; and was not then, in any way, to be put in issue. The representative is let in to make his claim as from the deceased infant's guardian, considering this court in such a proceeding for the sale of the infant's estate, as having officiated as his guardian, by having thus undertaken the conversion and management of his estate. The interest of these infants sold under the decree, was of a nature that could not, on their death, descend to their heirs as real estate; and therefore, this administrator of *Horatio Tilly*, deceased, who was one of the original parties to the proceeding, may now well be allowed thus to come in, to obtain so much of his intestate's interest as remained unsatisfied, at the time of his death, by the trustee *Brewer*.

Ordered, that the said trustee forthwith make a full and particular report of his proceedings on oath; and bring into court all the money now in his hands, as prayed, or show good cause to the contrary, on the third day of December next; provided, that a copy of this order, together with a copy of the said petition, be served on him on or before the twenty-first instant.

On the 3d of December, 1829, the trustee *Brewer*, made report on oath, in which he says, that he received a small part of the proceeds of said sale in cash; that the greater part was paid by said *Joseph Evans*, to the said *Lucretia*, *Edward*, *Elizabeth*, *Margaret* and *Sarah Tilly*, or for their benefit, with the trustee's con-

sent ; that considering the proceeds of the said sale to be applied to the maintenance of the aforesaid persons, some of whom, to wit : *Lucretia* and *Margaret*, were very young, and totally unable to provide for themselves, in such proportions as their respective necessities required, he appropriated the whole proceeds of sale, and a considerable additional amount, to that purpose ; that the said persons have each received from him, more than their proportions, if the same should be divided equally among them. *Horatio Tilly* has only received the sum of \$5 68. He was bound apprentice to a trade in the city of Washington, and in a short time after the sale, absconded ; and has never been since heard from ; and that is the only evidence of the death of the said *Horatio* ; that the said *Lucretia* and *Margaret Tilly*, were deserted by their relations, and in danger of perishing from want, when the said *Sarah Tilly*, who has since intermarried with the petitioner, herself contracted for her board, with Mrs. *Ann Hyde*, prevailed on the trustee to pay her board for one year, out of the proceeds of sale ; stating, that she herself would, about that time, be married, and able to take care of them after that time. But her marriage not taking place, this trustee was compelled, by motives of humanity, and by the intreaties of the said *Sarah*, to advance considerable sums from his own pocket, for their maintenance, they having no other property, or see them turned destitute into the street. For which expenditures, and all other expenditures as trustee, he refers to the vouchers herewith filed ; and which he prayed to be permitted to establish by proof, where they are not in themselves legal evidence ; that *Horatio Tilly* owes no debts ; and the object of obtaining administration of his estate, is to divide the proceeds among his said brothers and sisters ; and this trustee conceives, that he ought, at least, to be allowed the amount of the said *Lucretia's* and *Margaret's* parts of the said *Horatio's* interest, if he have any, and which he has already expended for their benefit ; and he further contends, that he ought to be allowed the whole of the amount claimed by the administrator of the said *Horatio*, even against his creditors ; but is ready to bring the same into court, if required.

19th April, 1830.—BLAND, *Chancellor*.—The matter of the petition of *Berry Griffith*, standing ready for hearing, and having been submitted on notes by the solicitors of the parties, the proceedings were read and considered.

This devise, as regards these infants, is one of a very singular

character. It is clear, that the trustee was to hold, at all events, for the use of the testator's daughter, *Elizabeth Tilly*, during her life; but whether any or what interest, during the same time, vested in her children seems doubtful. It is certain, however, that as tenant for life, she was constituted the pernor of the profits of the estate charged, either for her own exclusive use, or for her own benefit, and also for the maintenance of her children. During her life, therefore, it could only be the duty of the trustee to hold the legal estate for the purpose of protecting the right thus given to her. But on her death, a new and different interest vested in her infant children. After her death, the trustee is directed to hold 'to and for the maintenance of her children, until they should arrive at twenty-one years of age.'

Where an estate is given to a trustee to hold for the use of an adult of sound mind, for life or any given period of time, the object of the donation may be most beneficially obtained by considering the donee as the actual pernor of the profits; and merely allowing him to enter upon the estate, and gather for himself all the products and benefits he can obtain. But where such a donation is made to infants or lunatics, for their maintenance, from the very nature of the gift, it must be deemed to have been the intention of the donor, that the actual pernanacy of the profits should be committed to other hands for the benefit of the *cestui que use*; because otherwise, the express purpose of the bounty might fail, or become altogether nugatory.

Therefore, I hold it to have been the intention of this testator, that his daughter *Elizabeth*, should be allowed herself, to take the profits of the estate during her life, in any way she might deem most advantageous; and, that after her death, the profits should be collected by the trustee himself, and applied to the maintenance of her infant children.

The testator has made no distinction as to the nature and quality of the maintenance to be given to any of the infants; and consequently, they must be all placed upon the same footing, and be allowed to come in equally, share and share alike. And as it is a gift for maintenance only, it is manifest, that it must cease as well by the death, as by the full age of each one of them, although the testator is silent as to a termination of the right by death. Hence, supposing the estate to be equally productive each year, during the whole time this incumbrance continued, it is evident, that the fund thus appropriated for the maintenance of these infants,

would be applicable in greater proportions to the younger or survivor of them, as the right of each elder or other one, was terminated; since it is directed that the whole of the profits should be given in maintenance, even if there should be but one infant left. If this right of these infants had not been sold, there could have been no difficulty in directing the trustee to collect the annual profits of the estate, and to apply them to the maintenance of such of the infants, as should be alive at the time of the distribution.

But the sale which has been made, presents the subject under a new aspect. The whole of the rents and profits which could ever have been taken by the trustee for the benefit of the infants, have, by a kind of anticipation, been gathered at once, and the estate has been finally and conclusively discharged from the incumbrance; and therefore, the question now is, how are the proceeds of the sale of the whole of this right to be administered?

It must now be assumed, that the court had the power to order the interest of these infants to be sold, as directed by the decree of the 27th of October, 1807; since that decree cannot now be in any way revised or reversed. (*b*) And it must also be presumed, that the sale so ordered, was intended for the benefit of each of these infants respectively, according to the terms of the devise under which they claim, as the sale of that interest so given, was alone ordered to be sold by the decree; and consequently, the right of no one of them can now be taken to have been in any respect enlarged, lessened, or impaired by that decree. As infants, and during non-age, their claims were exactly equal; but, considered as elder and younger children, the extent and duration of their interests, in the proceeds of sale, are essentially different. The interests of the younger being greater than those of the elder, in proportion as the difference of age gives to the younger or survivor, a right to have a greater share of the whole annual product, applied to their maintenance after the death or full age of the others.

If the charge upon this real estate, for the benefit of these infants, had been suffered to remain, the whole profits must have been applied for the use of those only who were the infant survivors at the time the profits accrued. And as it could not have been the intention of the court to enlarge, diminish, or alter the rights of any one of them by the sale, it is clear, that these proceeds of sale, being in fact, the price of those rents and profits, must be dis-

(*b*) 1785, ch. 72, s. 27.

tributed in like manner, and upon the same principles as those rents and profits themselves would have been.

Suppose, therefore, the whole amount of the net proceeds of sale to be \$2,160, that sum would be equal to an average of \$360 per annum, for six years. Then supposing there to be six minors, the youngest of whom would obtain his full age in six years from the day of sale; and the right of one of them to be extinguished by death, or full age, every year; it would follow, that during the first year, there being six infants to maintain, each one would be entitled to no more than \$60, to be taken from the common fund; that during the second year, there being only five infants, the dividend to each would be \$72; the next year, there being only four infants, the dividend to each would be \$90; the next year, there being only three infants, the dividend would be \$120 to each; then, there being only two infants, \$180 would be awarded to each; and the last infant would take the residue, being the price of the rents and profits of the whole estate which would have accrued during the period of his minority alone.

The day on which each of these infants came of age, or died, must be ascertained; and then the net proceeds of the sale must be considered as the sum total of the rents and profits from the day of sale, when the trustee's right to take them, ceased, up to the full age or death of the youngest, or last, of the infants, when the interest sold, expired; and the distribution of the net proceeds of sale must be made upon those principles among those infants, or the representatives of those who died before their shares which thus vested, had been actually paid.

It is said that the death of the petitioner's intestate, is only presumed from his long absence. The general rule is, that any one who has not been heard of for the space of seven years may, for all legal and equitable purposes, be presumed to be dead. Therefore, in this instance, the death of *Horatio Tilly* may be assumed to have happened just seven years after the day on which it is shewn by proof, that he was last heard of.

It is expressly declared, by the law under which the sale of the interest of these infants appears to have been made, that no part of the principal arising from the sale shall, in any wise, be applied towards the maintenance of the infant unless the Chancellor shall consider it necessary. (c) Now, whether these proceeds are to be

considered as arising from a sale of the infants' real estate, or only from a sale of the rents and profits of such an estate during a given period, to which alone these infants were entitled; still, this is a legislative regulation in relation to the matter, which no trustee can be allowed, at his pleasure, to violate or disregard; he, of himself, cannot have a shadow of authority to make any application of the proceeds of sale in any way whatever. But, apart from the express provisions of any act of assembly, upon general principles, no trustee, appointed to make sale of property under a decree, in the usual form, directing the proceeds to be brought into court, can be allowed, in any manner whatever, to dispose of them without the express previous sanction of the court. This is a very ancient rule of this court, and a due regard to the interests of suitors, requires that it should be inflexibly adhered to. Therefore, all the causes shewn by this trustee as such, why he has departed from the positive command of the decree requiring the money to be brought in must be wholly disregarded. (*d*)

But it appears by the proceedings, that *Nicholas Brewer* has been clothed with several offices in connection with the rights of these infants; and that he has acted in two distinct characters. It is a settled principle, that where two or more capacities are vested in one and the same person, each capacity, for the purposes of justice, may be considered in the same light as if they were several persons. (*e*) *Nicholas Brewer* was appointed a trustee under the will of the late *Richard Higgins*; and I have described what were his rights and duties as regards the estate so placed in his hands for the maintenance of the infants. Considering him as a distinct person, while acting in that capacity, he must be treated, and allowed to account as their guardian, so far as he may have made any application of the proceeds, or in any manner contributed to their maintenance, to the extent of the proportion of the proceeds to which they may each one of them respectively be found to be entitled. In his other capacity of trustee or agent, employed by this court to make the sale, ordered by the decree, he must be charged with the whole amount of the proceeds of sale with interest, from the 1st of January, 1818. As an offset to which, he will be credited with all applications made for the maintenance of the infants, to the extent, and in the manner described; with inte-

(*d*) *Bennett v. Hamill*, 2 Scho. & Lefr. 580.—(*e*) *Coppin v. Coppin*, 2 P. Will. 295; *Johnson v. Mills*, 1 Ves. 283; *Binney's case*, ante 108.

rest from the time of their being made; and the balance, if any, with interest thereon, he will be directed to bring into court.

Whereupon, it is *Ordered*, that this case be, and the same is hereby referred to the auditor, with directions to state an account accordingly. And each party is hereby permitted to take testimony in relation to the said account before any justice of the peace, on giving three days notice as usual. Provided, that the said testimony be taken and filed in the chancery office on or before the twelfth day of June next.

On the 9th of December, 1830, the auditor made a report in obedience to this order, in which he said, he had stated an account No. 1, between the trust estate of *Elizabeth Tilly* and others, and the trustee, in which the proceeds of sale are first applied to the payment of the trustee's allowance for commission and expenses and costs of suit, and the residue is distributed amongst the infant children of *Elizabeth Tilly*, deceased, in manner as directed by the aforesaid order. The auditor has adopted the agreement of the 20th of July last, signed by the solicitors of *Berry Griffith*, and the trustee, as evidence of the ages of those children. He has then stated accounts between said trustee, and each of said infant children, which are numbered 2, 3, 4, 5 and 6, charging the trustee with each child's ascertained share of the proceeds of sales, and interest thereon from the first of January, 1818, to this date; and allowing credit for his disbursements, with interest on each disbursement from its date to this time. The result of those accounts is, that *Elizabeth Tilly*, *Sarah Tilly*, and *Lucretia Tilly* have been fully paid and satisfied; that there remains due to *Horatio Tilly*, deceased, the sum of \$263 95, with interest on \$153 09 from this date; and to *Margaret Tilly* the sum of \$243 92, with interest from this date.

To this report of the auditor the trustee *Brewer* excepted; and the case being submitted, it was, on the 29th of January, 1831, *Ordered*, that the exceptions be over-ruled, that the report be confirmed, and that the proceeds be applied accordingly.

BUCKINGHAM v. PEDDICORD.

The course of proceeding against a defendant, whose answer, on exceptions, has been held insufficient; or who has contumaciously neglected to answer; or who has, on demurrer or plea, failed to protect himself from answering as the bill requires.—The acts of assembly in relation to proceedings against non-resident, absconding, or contumacious defendants considered.—In all such cases the bill may be taken *pro confesso*, or testimony taken, upon which the court pronounces the decree; and if it has no jurisdiction must dismiss the bill.—How discovery may be had where the bill may be taken *pro confesso*.—An insufficient answer is as no answer; and therefore, upon such default, the bill may be taken *pro confesso*, and a final decree passed.

THIS bill was filed on the 2d of December, 1829, by *Larkin Buckingham*, administrator of *Thomas Evans*, deceased, against *Jasper Peddicord*, *Jeremiah Barthellow*, and *Asbury Peddicord*. The bill states, that for a debt due to his intestate the plaintiff, as administrator, brought suit and recovered judgment in the County Court of Anne Arundel county, at April term, 1828, against the defendant *Jasper Peddicord*, for the sum of \$885 20, with interest from the 16th of August, 1825, and costs; that previously thereto the defendant *Jasper*, on the 24th of February, 1826, with the fraudulent intent of avoiding the payment of the judgment, which he knew would be obtained against him, mortgaged to the defendant *Jeremiah*, his son-in-law, one hundred and fifty-one and a half acres of land lying in Anne Arundel county, for the consideration of \$581; and on the same day mortgaged to the defendant *Asbury Peddicord*, his son, one hundred and twenty-six acres of land lying in the same county, for the consideration of \$927 17; that afterwards, on the 10th of October, 1827, the defendant *Jasper*, for the consideration of \$1,400, conveyed in fee to this defendant *Jeremiah*, the same land which he had previously mortgaged to him; and on the 22d of October, 1827, the defendant *Jasper*, for the consideration of \$2,000, conveyed in fee to the defendant *Asbury*, the same land which he had previously mortgaged to him. The defendant *Jasper* so thereby conveying all his real estate to his son-in-law, and son; in consequence of which the plaintiff has been unable to obtain payment of his judgment, or any part thereof; that those conveyances were concocted in fraud, with the intent and purpose of cheating the plaintiff, and other of the creditors of the defendant *Jasper Peddicord*, and of avoiding the payment of his just debts; that the defendant *Jasper* was not indebted to the defendants *Jeremiah* and *Asbury* the consideration mentioned

in those conveyances at the time of their execution ; nor was the consideration money mentioned in them ever paid by the grantees to the grantor ; but that they, combining and confederating, executed those conveyances for the purpose of defrauding the plaintiff and others of the creditors of the defendant *Jasper Peddicord*. Whereupon the bill prayed, that those conveyances might be set aside as fraudulent ; that the land therein mentioned might be sold for the payment of the plaintiff's judgment ; and that the plaintiff might have such other and farther relief as might be deemed just and equitable.

To this bill each of the defendants on the 18th of February, 1830, put in a separate answer ; they each admitted the execution of the conveyances mentioned in the bill, and gave some account of the considerations on which they were respectively made. The plaintiff took exception to each of them ; and all coming on to be heard at the same time ; all the exceptions were sustained, and, by an order, passed on the 22d of March, 1830, each defendant was required to make and file a good and sufficient answer to the bill of complaint on or before the 22d of April then next, and to pay the costs of the exception, including a solicitor's fee.

27th April, 1830.—BLAND, *Chancellor*.—This case standing ready for hearing, on the default of the defendants to answer as required by the order of the 22d of March last, and having been submitted by the plaintiff on a motion to have the bill taken *pro confesso*, and a final decree passed, the proceedings were read and considered.

The course of proceeding against a defendant whose answer, on exceptions, has been held insufficient, does not appear to be clearly and generally understood. I shall, therefore, avail myself of this occasion to explain the mode of proceeding against a defendant who has contumaciously neglected to answer, or who has failed in an attempt, by a demurrer or plea to protect himself from answering as the bill requires ; or who, after such answer put in by him has been held, upon exceptions, to be insufficient, has failed to make a good and sufficient answer, as ordered.

The ancient practice of having the bill first filed, and directing process to be thereupon issued, as prayed, to bring in the defendant to answer, having been improperly departed from, it very often happened, that a defendant was vexatiously brought into court, as for a contempt in not answering, long before the complaint to which

he was required to make answer was exhibited, and made known by the plaintiff. This was a grievance; (a) to prevent which, it was declared, by an English statute, passed in the year 1705, and adopted here, that no process for appearance should issue till after the bill was filed, except in cases of bills for injunction to stay waste, or to stay suits at common law. (b) But even in these excepted cases, as no injunction is ever granted in England without an affidavit setting forth the circumstances out of which the equity arises, to which the bill, in order to insure a continuance of the injunction, must substantially conform, the defendant is thus, in all cases, according to the present course of proceeding, at once informed, on his appearance, of the cause of complaint to which he is called upon to answer. But no relief whatever can be granted upon the bill against an absent person; because no proof can be made against him, and there can be no foundation for a decree without confession or proof of the matters stated in the bill. (c)

The first process for calling the defendant in, to appear and answer, is the *subpæna*. If he should be abroad, or cannot be served with that process, the case can proceed no farther, and the plaintiff must, according to the English course of proceeding, in many cases, go without redress. But if after having been summoned by the *subpæna*, a defendant fails to appear, then there goes against him an attachment for contempt, (d) and after that an attachment with proclamation, then a commission of rebellion, and then a sergeant-at-arms; and if he should not be taken and brought in upon any of those writs, then there may be issued a sequestration, by which all his property may be taken, and held by the officer of the court; from which property, so taken, a plaintiff may, in some cases, obtain satisfaction. (e) But, notwithstanding that there could be no decree upon the bill against the defendant, until it was declared, by a British statute, passed in the year 1732, and adopted here, that in such cases, on publication being made as therein prescribed, warning the absent or absconding defendant, who had, or who had not been served with the *subpæna*, to appear, the bill

(a) Forum Rom. 26, 64; 1 Harri. Pra. Cha. 194.—(b) 4 Ann, ch. 16, s. 22; Kilty Rep. 247; 2 Mad. Cha. 197; 4 Inst. 92.—(c) Forum Rom. 36.—(d) Cowell v. Seybrey, 2 Bland, 18, note.—(e) Nodes v. Batle, 2 Rep. Cha. 283; Moyser v. Peacock, 3 Rep. Cha. 22; 2 Freem. 127; Davis v. Davis, 2 Atk. 23; 1 Harri. Pra. Cha. 194, 229, 242, 254.

might be taken *pro confesso*. (f) But as an express, or constructive appearance is deemed indispensable to enable a plaintiff to obtain relief; and as it sometimes happened, that a defendant, who had been arrested and brought in upon some one of the writs, following the *subpœna*, refused to enter his appearance, it was, by the same statute, declared, that if a defendant should, by virtue of any process, be brought into court, and should refuse to enter his appearance, the court might enter an appearance for him, upon which the plaintiff might proceed. (g)

After an appearance has been entered, if a defendant fails to answer, the plaintiff, to extract an answer from him, may sue out an attachment, and so proceed to sequestration; after which, the bill may be taken *pro confesso*, and a decree passed accordingly, without exhibiting any proof of the truth of its allegations, as was formerly deemed proper. (h) But if the defendant should be taken by any process, after his appearance, then he may be imprisoned and held in close custody until he has answered, or be brought in, and the bill taken *pro confesso* against him. (i) This course of proceeding may be applied as well to bills of revivor and amended bills as to original bills. (j) And as a case cannot be set for hearing until all the defendants have answered, or until the whole line of process has been run out, and the bill, where it is allowable, taken *pro confesso* against each, this mode of proceeding must be pursued against each, where there is a plurality of defendants. (k)

Upon any reasonable ground of indulgence, however, if the delay has not been extravagantly long, the court will, on the payment of costs, and on the defendant's communicating the answer he proposes to put in, and shewing its sufficiency, set aside the order for taking the bill *pro confesso*, and allow the answer to be filed. (l)

(f) 5 Geo. 2, ch. 25; Kilty Rep. 189; Mawer v. Mawer, 1 Cox, 104; Short v. Downer, 2 Cox, 84; Neale v. Norris, 5 Ves. 1; Winchester v. Beavor, 5 Ves. 113; 1 Fowl. Exch. Pra. 212.—(g) 5 Geo. 2, ch. 25, s. 2; 1 Fowl. Exch. Pra. 202.—(h) Johnson v. Desmineere, 1 Vern. 223; Denny v. Filmer Nelson, 65; Davis v. Davis, 2 Atk. 22; Anonymous, 10 Mod. 431; 1 Fowl. Exch. Pra. 200; 1718, ch. 5.—(i) Anonymous, 2 Cha. Ca. 237; S. C. 2 Freem. 27; Thomas v. Jones Nelson, 50; Hughes v. Owen Bunb. 299; Snowden v. Snowden, 1 Bland, 551.—(j) 2 Eq. Ca. Abr. 178; Jopling v. Stuart, 4 Ves. 619.—(k) 1 Fowl. Exch. Pra. 199; Geary v. Sheridan, 8 Ves. 192; Hoyer v. Penn, 1 Bland, 33.—(l) Williams v. Thompson, 2 Bro. C. C. 279; Hearne v. Ogilvie, 11 Ves. 77.

PARRON v. BRANNOCK, 14th July, 1721.—Bill, Answer, and Exceptions.—Exceptions held good, and ruled, that the defendant give in a better answer, and six hundred pounds of tobacco costs. Ordered, that attachment issue for costs. Answer

Such in substance were the principles and practice of the English and Maryland Court of Chancery, when the general assembly of this republic commenced that reformation by which so many material alterations have been made. They declared, that in all cases in chancery, the process of commission of rebellion and sergeant-at-arms, should be omitted as unnecessary; (*m*) and have virtually abolished the writ of sequestration, as a mesne process, by providing other means, incompatible with its existence, of attaining the same object. (*n*) They have prescribed a mode of proceeding against those who may be found within the jurisdiction of the court; and have also provided a mode whereby relief may be had in equity against absent defendants, who are not resident any where within the state; making all such regulations alike applicable to all cases, upon an original or any other kind of bill; as well where there is only one, as where there are a plurality of defendants, within or out of the state; and thus placing it in the power of the plaintiff to have each defendant brought in, and compelled to answer, or to have the bill taken *pro confesso* against

filed, and exceptions filed to the last answer adjudged good, and the answer insufficient, with nine hundred pounds of tobacco, unless cause shewn to the contrary February court, 1722. Further process to issue, with twelve hundred pounds of tobacco costs. *Ordered*, attachment, with proclamation to issue. Commission of rebellion issued to John Rider, Henry Ennalls, William Ennalls, and Henry Hooper. Commission returned *non est inventus*. *Ordered*, that the sheriff of the county be sergeant-at-arms in this cause; and *Ordered*, that the proper process of sergeant-at-arms issue, directed to the sheriff as sergeant; process issued and returned, *vide* return.

TILGHMAN, *Chancellor*.—It appearing in this cause, that the defendant hath put in two insufficient answers, which have been set aside upon exceptions; that the defendant hath not put in any other answer; and that the complainant hath run out all the process of contempt. Therefore, *Decreed*, that the bill be taken *pro confesso*; that the injunction be made perpetual as to the execution at law complained of in the bill, with costs; and that the complainant have a sequestration.—*Chancery Proceedings*, lib. I. R. No. 1, fol. 72, 73.

CHEW v. MOORE.—The object of this bill, filed on the 15th of February, 1769, was to foreclose a mortgage, &c. The defendant was summoned, and he appeared by his solicitor, but failed to answer.

February, 1774.—EDEN, *Chancellor*.—*Ruled*, if no answer in six months, from the 18th day of February, 1774, bill to be taken as confessed, and decree to be entered accordingly.

After which no answer having been filed, a final decree was passed.—*Chancery Proceedings*, lib. No. 1, fol. 56.

(*m*) 1785, ch. 72, s. 26.—(*n*) 1785, ch. 72, s. 19, 20; 1795, ch. 88, &c.; 1 Newl. Prac. Cha. 85.

him ; so as to proceed with the case, and to obtain a final decree against all, if necessary, where there is a plurality of defendants. (o)

In regard to defendants who may be found within reach of the process of the court, it has been declared, that if a defendant, being of full age, and regularly summoned, shall neglect to appear at the return court, and shall stand out the process of attachment of contempt, and attachment with proclamation, without appearing and putting in a good and sufficient answer, by the fourth day of the term to which it is returnable, (p) the bill may be taken *pro confesso* ; or the defendant being, after appearance, brought into court for not answering, may, on motion, stand committed until discharged by further order ; (q) and if he does not put in a good and sufficient answer by the fourth day of the next court, the bill may be taken *pro confesso*. And if the defendant shall have further time granted him to answer, and he shall not put in a good and sufficient answer before the expiration of the time, the bill shall be taken *pro confesso*, without any further delay ; and in all such cases, such decree may be made thereon as may be deemed just ; or the Chancellor may order a commission for the plaintiff to examine witnesses, or may examine the plaintiff on interrogatories, to ascertain the allegations of his bill, and may decree as he shall think just. (r) That every defendant appearing at the return court of the *subpœna*, shall file a good and sufficient answer on or before the fourth day of the court, next following the return court ; and if, not having further time granted to answer, he shall omit to do so, he shall be in contempt, and the plaintiff may have an attachment of contempt ; and on that being returned *non est*, may have an attachment with proclamation against him ; and if he shall not file a good and sufficient answer by the return court, of the last mentioned process, the bill, unless farther time has been granted him to answer, shall be taken *pro confesso* ; and such decree made, as may be thought just ; and if such a defendant shall have farther time granted him to answer, and he shall not, before the expiration of such time, put in a good and sufficient answer, the bill shall be taken *pro confesso*, without further delay, and such decree made

(o) 1785, ch. 72, s. 31 ; 1820, ch. 161 ; 1 Newl. Pra. Cha. 93 ; *Darwent v. Walton*, 2 Atk. 510 ; *Mayer v. Tyson*, 1 Bland, 560.—(p) Can a defendant after standing out this proces, be allowed, as of course, to come in, and demur or plead ? *Curzon v. De La Zouch*, 1 Swan, 193 ; *Cowell v. Seybrey*, 1 Bland, 18, note ; *Forum Rom.* 71.—(q.) *Man v. Parkinson*, 9 Mod. 266.—(r) 1785, ch. 72, s. 19.

thereon as may be deemed just; or the Chancellor may order a commission to issue, or examine the plaintiff on interrogatories, and thereupon decree as he may think just. (s) That if an attachment for want of appearance or answer, shall be returned served or attached, and the defendant shall not appear at the day of the return, the Chancellor may by order, limit a certain day, in the following term, on or before which the defendant shall appear, and put in a good and sufficient answer, plea, or demurrer, otherwise, the bill may be taken *pro confesso*, and a decree thereon; provided, that if such defendant shall, before a decree, appear, and immediately put in such answer, there shall be the same proceedings as if he had regularly appeared and answered. (t)

And further, that in case a *subpæna* shall be returned *non est* by the sheriff of the county where the defendant shall be known, or generally supposed to reside; and on affidavit of some indifferent person, of the said known or supposed residence, and of the defendant's having avoided, or kept out of the way of the sheriff, or evaded the service of the *subpæna*, (u) the Chancellor may, on motion, direct publication to be given in some newspaper, convenient to the known or supposed residence of the defendant, at least three weeks successively, of the filing, subject and object of the bill, and of the day fixed, *not less than four months subsequent to the publication*, for the defendant's appearance; and on his failing to appear, to proceed as against a non-resident; provided, that if such defendant shall appear, at any time before a decree, and shall, on or before the fourth day of the subsequent term, put in a good and sufficient answer, or a good plea or demurrer, the proceedings thereafter, shall be the same as if he had appeared to the summons; and, if, within nine months after a decree, such defendant shall appear, file a petition, praying to set aside the decree; and likewise, answer, plead or demur, the Chancellor shall annul the decree as to such defendant, and there shall be the same proceedings, as if he had appeared to the summons. (w) And that where a *subpæna* has been returned summoned, and the defendant neglects to appear, or appearing, fails to put in a good and sufficient answer within the time prescribed by the rules of the court, an interlocutory decree may be entered, and a commission issued *ex parte*

(s) 1785, ch. 72, s. 20; 1 Harri. Pra. Cha. 278; 1 Newl. Pra. Cha. 125.—(t) 1799, ch. 79, s. 2.—(u) *Davis v. Davis*, 2 Atk. 22; 1828, ch. 184.—(w) 1797, ch. 114, s. 2, 3; 1773, ch. 7, s. 3, 4; 1832, ch. 302, s. 3.

for the taking of testimony in support of the allegations of the bill ; upon the return of which, the court may proceed to a final decree. But that, when the bill shall charge any matter as being within the private knowledge of the defendant, and the plaintiff shall satisfy the court, by affidavit in open court, that such matter does rest in the private knowledge of the defendant, the bill as to such matter may be taken *pro confesso*, and a final decree made, as if such matter had been proved or admitted. (x)

But there being a great variety of instances in which it was important that some means should be given for obtaining relief in equity against persons who were competent to answer, (y) but were not within the jurisdiction of the state, all such cases have been provided for by several general, and apparently comprehensive legislative enactments ; (z) which appear to have virtually modified, or repealed several then existing provisions in relation to the same matter ; (a) and to have more particularly specified what should be deemed sufficient *notice* as spoken of in some other laws. (b)

It has been declared, that, *in all cases whatever*, where a bill shall be filed against a person not residing within the state, the Chancellor may direct such notice of the bill, and the object thereof by advertisement in newspapers, or otherwise, warning the defendant to appear on or before some day to be fixed, *not less than four months from the time of the first advertisement*, to shew cause why a decree should not be passed as prayed ; and, in case, the defendant shall not appear, the bill shall be taken *pro confesso*, or a commission shall, on application of the plaintiff, be issued to take depositions on his part ; and on the return thereof, the Chancellor may proceed to decree according to the facts proved ; provided, that if the defendant shall appear before the decree, there shall be the same proceedings as if he had appeared on the return of a *subpœna* ; and provided also, that if any person against whom a decree shall be made shall appear within eighteen months after the date of the decree, and require a review of it upon bill filed, the Chancellor shall proceed to an examination of the matters in dispute, and decree as if such person had originally appeared. (c)

(x) 1820, ch. 161, s. 1, 2.—(y) *Carew v. Johnston*, 2 Scho. & Lefr. 292 ; *Knight v. Young*, 2 Ves. & B. 185.—(z) *Smith v. The Hibernian Mine Company*, 1 Scho. & Lefr. 238.—(a) 1773, ch. 7, s. 3, 4 ; 1785, ch. 72, s. 30, 31 ; 1787, ch. 30, s. 2.—(b) 1791, ch. 79 ; 1792, ch. 41 ; 1794, ch. 60.—(c) 1795, ch. 88, s. 1 ; 1820, ch. 161, s. 4, 5 ; 1831, ch. 311, s. 13 ; 1832, ch. 302, s. 3 ; *Knight v. Young*, 2 Ves. & B. 185.

But, where the proceeding is against the heir at common law, with publication against the other heirs under the act to direct descents, such appointed day must *not be less than four months subsequent to the publication*; (d) and as against a non-resident defendant to a bill of interpleader, the day appointed for his appearance, must be *not less than six months from the time of the publication of the order*. (e)

And it has been further declared, that if a bill be filed against any person, to compel a specific performance of a contract, who is not a resident of the state, or to be found therein, and it cannot be ascertained whether he be living or not; or if dead, whether he left any legal representatives, or who they are, the Chancellor may, without the appearance of the absent party, either take the bill *pro confesso*, or issue a commission for taking depositions *ex parte*, and on taking the bill *pro confesso*, or the return of the commission, decree as justice and equity may require: Provided, that the plaintiff shall give *at least six months' notice of his application*, in such newspaper as the Chancellor shall direct; and provided, that if the defendant shall appear at any time, not exceeding eighteen calendar months after such decree, and request a review of it upon bill filed, the Chancellor shall proceed to an examination of the matter, and to a final decree in the same manner as if such defendant had originally appeared; and provided also, that such defendant may, at any time before a decree, appear and be admitted to defend on filing a good and sufficient answer, plea, or demurrer. (f) That in case a defendant resides out of the state, and a summons has been served upon him, (g) the Chancellor may, by order, limit a day on or before which he shall appear, and put in a good and sufficient answer, plea, or demurrer; and if a copy of the said order be served upon him, or inserted in some convenient newspaper *at least three months before such day*, and he shall not appear and answer, the bill may be taken *pro confesso*, and a decree passed accordingly; provided, that if such defendant shall, before a decree, appear and immediately put in such answer, there shall be the same proceedings as if he had regularly appeared and answered. (h) And that if, on the death of a plaintiff, a bill of revivor shall be filed and the defendant shall have removed out of the

(d) 1797, ch. 114; 1831, ch. 311, s. 10.—(e) 1826, ch. 199.—(f) 1804, ch. 107; 1787, ch. 30; 1792, ch. 41; 1795, ch. 88, s. 1.—(g) *Scott v. Hough*, 4 Bro. C. C. 213.—(h) 1799, ch. 79, s. 1, 2.

state, the Chancellor may direct such proceedings as may be best calculated to promote substantial justice ; provided, that the defendant be then alive, and his answer shall have been put in before the death of such plaintiff. (*i*)

But as all these modes of proceeding against absent defendants by publication related only to *adults*, or to persons competent to refuse to answer on being so warned, (*j*) it was necessary to provide for cases in which *infants* were defendants ; and therefore, as regards infants it was declared, that if a bill shall be filed against an infant out of the state, there shall be the same proceedings, and the Chancellor may decree as if the infant were of *full age* ; provided, that in all cases, where a decree shall be passed against an infant out of the state ; except in those cases in which proceedings against infants out of the state are already provided for by law, (*k*) there shall be liberty reserved for the infant, within eighteen calendar months from the date of the decree ; or within six such months after the infant shall attain the age of twenty-one years, to shew cause wherefore the decree ought not to have been passed ; and the bill filed for shewing cause shall be against the original plaintiff, or those claiming under him, on which the Chancellor shall direct proceedings by *subpœna*, or such notice as he shall think proper of the substance and object of the bill, by a day limited, *not less than four months after notice*, for the defendant to file an answer to such *bill of revision*, which if not filed, the Chancellor may proceed to a revision of the decree before passed, or direct proofs *ex parte* to be received as evidence in addition to the former proceedings ; and in case of the defendant's appearing to such bill of revision, additional evidence and proceedings may be had, and the Chancellor shall pass such decree as circumstances and the equity of the case may require. (*l*)

All these newly prescribed modes of proceeding, by publication against adult and infant defendants applied, however, to none other than original and regular proceedings in equity, and therefore, in relation to all interlocutory petitions in chancery, as well as to *petitions* of all other kinds addressed to it, or to any other of the courts of justice, it has been declared, that in all cases of *petitions*, instituted *in any of the courts* of this state, to which a non-resident may be a party, such court, upon being satisfied of such

(*i*) 1799, ch. 79, s. 3.—(*j*) *Carew v. Johnston*, 2 Scho. & Lefr. 292.—(*k*) 1789, ch. 46 ; 1790, ch. 33 ; 1797, ch. 114, s. 5 ; 1832, ch. 302, s. 9.—(*l*) 1799, ch. 79, s. 4.

non-residence, and that its process cannot be served on him, may order such notice to be given by advertisement in the public newspapers, or otherwise, as it may deem reasonable, warning such non-resident to appear by a certain appointed day, *at least three months thereafter*; whereupon the court shall hold jurisdiction of the case and determine the same as if such non-resident had appeared thereto. (m)

And, finally, as to cases in chancery, in general, it has been declared, that in case any defendant shall appear agreeably to an order limiting a day, or voluntarily, he shall put in a good and sufficient answer, plea or demurrer, on or before the fourth day of the term succeeding such appearance, or be liable to be proceeded against, if a resident of the state, as if he had been summoned and appeared; and if he be a non-resident, either the bill shall be taken *pro confesso*, or a commission may issue to take depositions *ex parte*, and a decree thereon made. (n) That in cases where a defendant may be ordered to produce books in his possession, on his failing to do so, or to shew sufficient cause at the term appointed therefor, the Chancellor may take the allegations of the bill *pro confesso*, and decree *ex parte* in such manner as shall appear just. (o) And that in all cases whatever, it shall be at the discretion of the Chancellor, where he is authorized to decree without the appearance of the defendant, either to take the bill *pro confesso*, or direct a commission for taking depositions *ex parte*, as by law is directed, in certain cases where the defendants are non-residents. (p) But, as in all cases where the bill is to be taken *pro confesso*, the court hears the pleadings, and itself pronounces the decree, as seems to be expressly required by legislative enactment in some cases; (q) and does not permit the party to draw up his own decree; and so take such a one as he himself conceives he can abide by, as in cases of default by the defendant at the hearing; (r) it follows, that if it should appear, upon the face of the bill, as thus taken *pro confesso*, as when taken for true upon demurrer, that the court has no jurisdiction, or that the plaintiff has no equitable claim to relief, the bill must be dismissed with costs. (s)

In the ordinary course of the court, according to the existing

(m) 1818, ch. 133, s. 1.—(n) 1799, ch. 79, s. 9; *Clapham v. Clapham*, 1 Bland, 126, note.—(o) 1798, ch. 84; 1807, ch. 140.—(p) 1799, ch. 79, s. 5; *Johnson v. Desmineere*, 1 Vern. 223; *Dominicetti v. Latti*, 2 Dick. 588.—(q) 1820, ch. 161, s. 1.—(r) *Geary v. Sheridan*, 8 Ves. 192.—(s) *Molesworth v. Verney*, 2 Dick. 667; *Iglehart v. Armiger*, 1 Bland, 528.

practice, a bill may be taken *pro confesso*, upon a demurrer in bar being over-ruled, or on a plea being found false. (*t*) And if a defendant attempts to protect himself from answering by a demurrer or plea, and fails, so that the bill may be taken *pro confesso*, he may without being allowed or ordered, to answer as the bill requires, be compelled, if called on by the plaintiff, to answer interrogatories, and to make such disclosures as may be necessary, to enable the plaintiff to obtain the relief he seeks. (*u*) And so too, where a bill has been taken *pro confesso*, the necessary discovery required of the defendant may be supplied by proofs taken for that purpose, according to the ancient English mode, (*w*) or upon interrogatories propounded to the plaintiff, or upon his affidavit, or by proofs taken in the manner prescribed by the before mentioned acts of assembly. If, however, the plaintiff's bill so exactly and perspicuously sets forth the facts and circumstances of his case, as to lay a complete foundation for the relief he asks, on its being wholly taken for true, there can be no occasion for enforcing an answer in any form, from the defendant; since his tacit admission of the truth of all the allegations of the bill, as they stand, will be amply sufficient to enable the court to do full justice to the plaintiff.

It is a general rule, that wherever a defendant submits to answer, he must answer as fully as the bill requires. (*x*) If he puts in an answer, to which the plaintiff excepts, and the exceptions are sustained, the defendant must put in a better answer by the time appointed for his so doing. The order by which his answer is declared to be insufficient, places him exactly in the situation in which he stood immediately before his insufficient answer was filed; and makes him again liable to any proceeding which might, at that time, have been had against him; so that where an answer has been adjudged, on exceptions, to be insufficient, and the defendant has not, as ordered, filed a sufficient answer by the appointed day, the plaintiff may, according to the principles of the English practice, again take up and continue his process of contempt, just where he had left off when the insufficient answer was filed; or as at that time, if he was so entitled, have his bill taken *pro confesso*, and obtain a decree thereon accordingly. Recollecting how-

(*t*) *Davis v. Davis*, 2 Atk. 24; *Wood v. Strickland*, 2 Ves. & Bea. 158; *Trim v. Baker*, 1 Cond. Cha. Rep. 240; *Rowley v. Eccles*, 1 Cond. Cha. Rep. 260.—(*u*) *Brownsword v. Edwards*, 2 Ves. 246; *Hawtry v. Trollop*, Nelson, 119; *Wood v. Strickland*, 2 Ves. & Bea. 158; *Sanders v. King*, 6. Mad. 63; *Thring v. Edgar*, 1 Cond. Cha. Rep. 457; *Mitf. Plea*. 302.—(*w*) *Johnson v. Desmoneere*, 1 Vern. 223.—(*x*) *Salmon v. Clagett*, post.

ever, that when the defendant submits to answer the exceptions; or the answer upon exceptions, is held to be insufficient, and the defendant answers accordingly, the plaintiff can take no other or new exceptions, but must have the sufficiency of the whole of such answers again put to the test upon the original exceptions. (y)

An insufficient answer must of necessity, be regarded as no answer; since it would be unjust or ruinous, to compel a plaintiff to reply to, and go to trial, on an insufficient answer, full of absurdities and inconsistencies, or which was, in many particulars, palpably deficient. The taking of exceptions to an answer, is tantamount to a demurrer, upon an insufficient plea at law; and if such a demurrer is sustained, the plaintiff has judgment, because the plea is insufficient; and so in equity, on exceptions to the answer being sustained, the like consequences must follow. But for the adoption of this rule, there would seem to be no end to the delays which a defendant might produce by repeated sham answers. And indeed, even as the rule now stands, according to the English system, the expensive delays in chancery proceedings, under the present mode of obtaining a full answer, after a previous one had been declared insufficient, have been considered as so serious a grievance, that there has been recently a great effort made to obtain from parliament, some reforms, similar to those which have been so long since engrafted into our system. (z)

If, then, we apply these reasonable and established principles, that, where a defendant has failed to put in a sufficient answer, as required, the plaintiff may renew his course of proceeding from the point at which he had left off when the insufficient answer was filed; and that an insufficient answer must be regarded as no answer, to the course of proceedings prescribed by the before-mentioned legislative enactments, it will be seen that it has been expressly declared, that on a defendant being returned attached for

(y) *Dupont v. Ward*, 1 Dick. 133; *Turner v. Turner*, 1 Dick. 316; *Gregor v. Arundel*, 8 Ves. 88; *Partridge v. Haycraft*, 11 Ves. 575; *Williams v. Davies*, 1 Cond. Cha. Rep. 217; *Ovey v. Leighton*, 1 Cond. Cha. Rep. 433; *Hodgson v. Butterfield*, 1 Cond. Cha. Rep. 434; 1 Harr. Pra. Cha. 321.—(z) *Anonymous*, 2 P. Will. 481; *Hawkins v. Crook*, 2 P. Will. 556; S. C. Mosely, 294, 383; *Turner v. Turner*, 1 Dick. 316; *Bromfield v. Chichester*, 1 Dick. 379; *Child v. Brabson*, 2 Ves. 110; *Davis v. Davis*, 2 Atk. 24; *Darwent v. Walton*, 2 Atk. 510; *Wallop v. Brown*, 4 Bro. C. C. 212, 223; *Gordon v. Pitt*, 4 Bro. C. C. 406 and 544; *Attorney-General v. Young*, 3 Ves. 209; 1 Hove. Supp. 362; *Jopling v. Stuart*, 4 Ves. 619; *Gregor v. Arundel*, 8 Ves. 88; *Bailey v. Bailey*, 11 Ves. 151; 2 Hove. Sup. 251; *Anonymous*, 2 Ves. jun. 270, and 1 Hove. Sup. 256; *Landon v. Ready*, 1 Cond. Cha. Rep. 23; 2 Eq. Ca. Abr. 179; *Forum Rom.* 106.

not answering, he may be committed, or the plaintiff may obtain an order to take the bill *pro confesso* at the next term, or that if a defendant shall have further time to answer, and shall not, before the expiration of the time, put in a good and sufficient answer, the bill may be taken *pro confesso*, without any further delay, and a decree passed thereon. From which, it follows, that after a defendant's answer has, upon exceptions, been declared to be insufficient, the plaintiff, because of his deeming the discovery he seeks necessary to his case, may, if he can, by the specified process, have the defendant arrested and committed to close custody until he does answer; or the order, determining the answer to be insufficient, and requiring a better answer by an appointed day, may be considered, as in truth it is, a grant of further time to answer, since the defendant thereby not merely obtains time to deliberate before he makes answer, but has its deficiency, after it has been made, particularly pointed out, and is thereupon allowed further time to supply its defects. And, therefore, after the expiration of the time allowed by such an order, if a good and sufficient answer be not put in, the plaintiff may well have his bill taken *pro confesso* without further delay, and a final decree made thereupon accordingly. (a)

If a plaintiff could not be allowed, in this manner, either to have the defendant attached and compelled to answer, or to have his bill taken *pro confesso*, as if no answer at all had been filed, then those legislative provisions, by which the proceedings against a defendant to obtain an answer, or have the bill taken *pro confesso* have been regulated might be continually evaded or rendered altogether nugatory. It would only be necessary, in any case, for the defendant to file a mere sham answer, with the express view to its being declared insufficient, so as to throw the plaintiff back upon and force him to resort to, and again run out the same line of process up to that at which he had left off. Such a course, it is evident, would be in direct opposition to the spirit, if not to the letter, of those legislative enactments, the clear principles of which may be so aptly applied to all cases situated like the present. Upon the whole, therefore, I am of opinion that this plaintiff may now have his bill taken *pro confesso* for want of an answer, and have a final and absolute decree founded upon that default and tacit confession.

Whereupon, it is *Decreed*, that the said bill of complaint be

(a) Denny v. Filmer Nelson 65; Ogilvie v. Herne, 13 Ves. 563; Landon v. Ready, 1 Cond. Cha. Rep. 23.

taken *pro confesso*; that the said several deeds and conveyances from the said *Jasper Peddicord* to the said *Jeremiah Barthellow*, and to the said *Asbury Peddicord*, in the bill mentioned, be, and the same are hereby declared to be fraudulent and utterly void as against the said plaintiff; that the property be sold; that *Thomas S. Alexander* be the trustee to make the said sale, &c.

MURDOCK'S CASE.

An injunction to stay waste granted to a mortgagee, before the mortgage debt became due.—A defendant may be permitted, by a supplemental answer, to explain equivocal expressions used in his first answer, leaving the first answer to stand.—In a bill filed by a mortgagee to stay waste, before the debt became due, the prayer for a sale being incompatible with its other statements, was rejected as surplusage; and such a bill was not, afterwards, on a bill to foreclose or sell, considered as another bill then pending for the same cause of suit.—Although no trustee can himself purchase, yet a plaintiff, creditor, or mortgagee, may purchase at a sale made by a trustee; and the purchase money, after deducting all commissions, expenses, and costs, may be discounted from or applied to the discharge of so much of the debt, when adjusted, then due to such purchaser.—After the ratification of the sales the purchaser may be put into possession, if no good cause to the contrary be shewn.—That the court may not be baffled, it may order that the bids of some persons be not received, or received only upon condition.—The object of an injunction granted before answer, is to preserve all things in their then condition; not to determine any right by anticipation, or to undo or restore any thing, except only in so far as it may consequentially follow from the operation of the injunction.—The mode of obtaining and proceeding upon an attachment for a breach of an injunction.—Pragmatic trespassers, pending an injunction bill, may be made to remove the erections made by them on the property in controversy.

THIS bill was filed on the 15th of January, 1825, by *William Brewer* against *Elizabeth Murdock*, in which it was stated, that the late *Gilbert Murdock* and the defendant, his then wife, on the 27th of February, 1822, to secure to the plaintiff the payment of the sum of \$500 on or before the 27th of February, 1825, and the annual payment of the interest thereon, mortgaged to him a tract of land, belonging to her, called Proctor's Forest; that the whole interest had been paid as it became due; that the defendant was cutting and carrying away the timber and wood growing on the land, by which means it would be so lessened in value as not to sell for sufficient to pay the mortgage debt. Upon which he prayed for an injunction to stay waste, and that a decree might be passed for the sale of the mortgaged premises for the payment of the debt

and interest, and for general relief. An injunction was granted as prayed.

The defendant, by her answer, admitted the cutting and carrying away of timber, as charged, but averred that the land would, notwithstanding, be more than sufficient to pay the debt; and as to the prayer for a sale, she relied on the fact that no part of the debt was due at the time the bill was filed.

Upon hearing of the motion to dissolve, on the 11th of October, 1825, the injunction was continued to the final hearing or further order.

On the 1st of March, 1825, this plaintiff filed another bill against this defendant, in which he stated the facts in relation to the mortgage as in the before-mentioned bill; and that the mortgaged land was the property of the defendant, whose husband was dead intestate, and that she had been appointed administratrix of his personal estate, including his chattels real; that on the non-payment of the mortgage when due, the defendant was to have a lot of ground in the city of Annapolis sold, and the proceeds applied in satisfaction of the debt, which had not been done; and that the whole mortgage debt, with one year's interest, was then due, upon which he prayed a sale, &c. In this bill there was no allusion to that filed on the 15th of January, 1825.

On the 9th of July, 1825, the defendant put in her answer, in which she admitted the execution of the mortgage; but averred that it had been obtained from her husband, who was an illiterate and, unhappily, an intemperate man, by great importunity and undue influence; that there were certain conditions and stipulations in relation to certain lots purchased from the plaintiff by her late husband, and which lots formed the consideration for which the mortgage had been given, which had not been complied with; that the plaintiff having no title to those lots, the consideration of the mortgage had therefore failed; and that the plaintiff had, on the 15th of January, 1825, filed his bill, praying a sale of the mortgaged property, which was then depending, and therefore she relied on the pendency of that suit as a bar to this.

The defendant, by her petition on oath, stated, that by a mistake and misapprehension, she had, in speaking of the character of her late husband in her answer, said that he was an intemperate man; since which, it had occurred to her, that the expression might be construed to import the excessive use of spirituous liquor, which was not her meaning; but that what she said was meant to be ex-

pressive of his violent character and intemperate passions; that no commission had been issued, nor any proofs taken. She, therefore prayed leave to amend her answer in this particular.

18th August, 1825.—BLAND, *Chancellor*.—It appears that the defendant has thought proper to correct her defence as regards the character of her deceased husband. Giving his character in her answer, she has used the word *intemperate*, from which it may be inferred that he was either excessive in meat and drink, or that he was passionate and ungovernable. The word *intemperate*, according to the most approved authorities, conveys both of those meanings. The defendant now alleges, by her petition, that the latter was the sense in which she intended to use the word. Therefore, it is *Ordered*, that the defendant be, and she is hereby permitted to file a supplemental answer, correcting the mistake, as prayed; leaving to the parties the effect of what was originally sworn with the explanation of the supplemental answer. (*a*)

After which, the plaintiff put in his general replication, commissions were issued, and testimony taken and returned.

2d October, 1826.—BLAND, *Chancellor*.—This case standing ready for hearing, the counsel on both sides were fully heard, and the proceedings read and considered. It very satisfactorily appears, from the proofs, that the contracts relied on by the plaintiff in his bill, were deliberately and fairly made and entered into in all respects whatever. And it also appears, that the plaintiff is now fully able to convey to the representatives of the late *Gilbert Murdock*, senior, a good and sufficient title to the property sold to him according to the terms of the contract between them.

With regard to the allegation of the defendant, that the plaintiff had previously brought another suit for the same cause, which suit was then depending, it will be sufficient to observe, that on advertent to the bill referred to, which was filed on the 15th of January, 1825, it appears upon the face of it, that it can only be considered as an injunction bill to stay waste; the prayer for a sale being utterly incompatible with its statement, must, necessarily, be regarded as mere surplusage. And, rejecting the prayer for a sale, it cannot, in any way whatever, be considered as a bill for a sale, or to foreclose a mortgage, which is the sole object of this suit.

(*a*) *Curling v. Townshend*, 19 Ves. 630; *Livesey v. Wilson*, 1 Ves. & Bea. 149; *Strange v. Collins*, 2 Ves. & Bea. 163; *Edwards v. McLeary*, 2 Ves. & Bea. 256.

There is not, therefore, now, nor has there been at any time depending in this court, as is alleged, two suits between these parties having the same object.

Whereupon, it is *Decreed*, that *Elizabeth Murdock*, administratrix of *Gilbert Murdock*, deceased, pay to the plaintiff the sum of \$500, with interest thereon from the 27th of February, 1824, until paid, and the costs of this suit on or before the 2d day of November next. And that on the said mortgage debt and costs being paid, the plaintiff convey to the defendant all the term of years yet to come in the lots in the proceedings mentioned. And on the defendant failing to pay, as ordered, then the mortgaged property to be sold for ready money, &c. &c.

From this decree the defendant appealed, and on the 25th of June, 1828, it was affirmed, with costs.

The trustee made sale of a part of the mortgaged property, as directed by the decree, and reported that he had sold the leasehold lot to the plaintiff on the 31st of July, 1828, for the sum of \$20, which sale was finally ratified. The purchaser *William Brewer* then filed his petition, praying that the trustee might be directed to set off the purchase money against so much of his, the plaintiff's, claim, except the commissions which he had paid, and that *Elizabeth Murdock*, the defendant, who held the property, might be ordered to deliver it up to him.

10th October, 1828.—BLAND, Chancellor.—*Ordered*, that the account between the purchaser and the trustee be adjusted as prayed. And it is further *Ordered*, that the said *Elizabeth Murdock* forthwith deliver the possession of the property in the petition mentioned, unto the said *William Brewer*, or shew good cause to the contrary, on the 23d instant. Provided that a copy of this order, together with a copy of the foregoing petition, be served on the said *Elizabeth* on or before the 14th instant.

No cause having been shewn, an injunction to deliver possession was ordered and issued; which having been returned, but not having been obeyed, on the 31st of October, 1828, a *habere facias possessionem* was, on motion, ordered, by virtue of which, the purchaser was put into actual possession.

The trustee further reported that he had sold forty-four acres of land, being another parcel of the mortgaged property, upon condition that if the purchaser did not pay, as required, on the day of

the ratification of the sale, that the next highest bidder should be considered as the purchaser, and that he had sold to *Elizabeth Murdock*, the defendant, as the highest bidder, and *William Brewer*, the plaintiff, as the next highest bidder. Upon which, the usual order *nisi* was passed; which having been published, the matter was submitted.

20th January, 1829.—BLAND, *Chancellor*.—While on the one hand this court has allowed to a trustee, in some respects, a greater range of discretion in making sales under a decree than is granted to a master in chancery in England; (b) so, on the other hand, it has, as occasion seemed to require, guarded such sales with more precautionary restrictions than have ever been adopted by the English court. This court will not suffer its proceedings to be delayed or perverted in any way whatever; (c) and therefore, where it has ascertained, that a person who had been reported by the trustee as the highest bidder had been unable to comply with his bid, or had conducted himself fraudulently, or had attempted to baffle the court; upon a re-sale, the trustee has been ordered to reject the bid of such person altogether. And so too where there is just reason to believe, that some one or more persons intend to outbid all others, and cause themselves to be reported as purchasers, with a design to embarrass the court, or to delay the plaintiff in the recovery of his claim; or who having no ostensible means of paying the purchase money, may yet be tempted to bid over every one else from an idle hope of being able to pay, the court may order or allow the trustee to report two or more persons as the highest bidders, upon the express condition, that if he who is reported as the highest bidder does not comply with the terms of sale, the next highest bidder may be received and considered as the purchaser. (d) The trustee has here very pro-

(b) *Gibson's Case*, 1 Bland, 144.—(c) *Deaver v. Reynolds*, 1 Bland, 50.

(d) *MONROE v. MONROE*.—In this case the decree directed the real estate of *Horatio G. Monroe*, deceased, to be sold on a credit of twelve months. Before a ratification of the sale, or even the publication of the usual order *nisi*, the trustee, by his petition not sworn to, stated that *James Monroe*, who he had reported as the purchaser, had positively and repeatedly refused to give bond for the payment of the purchase money, as required by the terms of the sale; whereupon, the trustee prayed that a re-sale might be ordered at the cost of the purchaser, making him liable to pay the loss, if any, &c. Upon which an order was passed appointing a day for hearing, of which notice was to be given; after which notice having been given, the matter was brought before the court.

14th July, 1821.—KILTY, *Chancellor*.—Without expressing any opinion as to the liability of the purchaser to pay the difference or loss, if any, on a re-sale, I do not

perly made such a report in regard to the defendant who had already made default in not paying the debt within the time allowed

consider it competent for the court to decree or order the same in a summary way. The trustee is authorized and directed to make a re-sale of the property as directed in the decree, repeating the notice, and inserting therein the further terms which are hereby added, *to wit*, that on failure of the highest bidder to comply with the terms, by giving bond on the day of sale, the next highest bidder will be considered the purchaser, and so on if there should be several bidders.

The property was re-sold accordingly, and the sale finally ratified.

CRESAP v MARTIN.—In this case Hector Scott, the purchaser at the trustee's sale, after the sale had been reported, and an order of ratification *nisi* had passed, but before the time allowed to shew cause had elapsed, on the 27th of May, 1822, filed his petition, in which he acknowledged he had been the highest bidder as reported, but prayed that the sale might not be ratified, because the land was subject to the liens of several other and prior incumbrances, the holders of which were not parties to the suit; and also, because Maria Keene, a party, was, at the time the suit was instituted, and then was a lunatic. At the foot of this petition the trustee subjoined his assent to the vacation of the sale, because the petitioner was, as he said, an insolvent debtor.

28th May, 1822.—JOHNSON, *Chancellor*.—The trustee, and Robert Oliver, who claims an interest in the premises, also consent that the sale made to Hector Scott should be set aside, for the reasons set forth by them; and as Hector Scott is not satisfied with the title that may be obtained under the proceedings, an application on the part of the trustee is made, that he should not again be permitted as a purchaser.

It is thereupon *Ordered*, that the said sale, made by the trustee, be, and the same is hereby annulled and set aside. The trustee will again expose the premises to sale under the decree; and at the time of sale, he will pay no regard to any bid the said Hector Scott may make for any part of the property, and the highest bidder, excluding the said Scott, shall be returned as the purchaser.

On the 7th of August, 1822, Hector Scott filed a petition remonstrating against the said order excluding him from the biddings, and stating that others, through him, might be willing to buy the land, notwithstanding any objections he might have to the title under the decree; and that his exclusion, or that of any one else, might materially prejudice the sale; and averring that he had no knowledge whatever of the proposal of the trustee to have him excluded.

8th August, 1822.—JOHNSON, *Chancellor*.—According to the report of the trustee heretofore made, Hector Scott was reported as the purchaser. By the terms of sale, the purchaser was to pay the money on the day of sale, or on the ratification. The money was not paid on the day of sale, and previous to the time fixed on for the ratification, the purchaser himself objected to the ratification, alleging the title was insecure, and requesting the sale should be annulled. The trustee seeing that the purchaser wished the contract to be destroyed, consented to an order to that effect. In the passing the order, no judgment was formed as to the sufficiency or insufficiency of the title; but as the purchaser himself had, on examination, it is presumed, satisfied himself of the defect of the title, it is hardly to be presumed he would wish again at a public sale to bid for the land, the title to which remained as before; but lest this might be done, and that for the purpose of delay, and to defeat an effectual sale, beneficial to those concerned in the decree, it was thought advisable to direct

by the decree; which report may, therefore, be ratified, leaving it hereafter to be determined which of those two highest bidders is to be deemed the actual purchaser.

Ordered, that the sale as made and reported by the trustee be absolutely ratified and confirmed, no cause having been shewn to the contrary as allowed by the said order, &c.

The trustee immediately after represented by his petition, that *Elizabeth Murdock* had not paid the purchase money as stipulated, &c.

22d January, 1829.—BLAND, *Chancellor*.—*Ordered*, that the said *Elizabeth Murdock* forthwith bring into court the purchase money now due for the property in the proceedings mentioned, together with legal interest thereon, or shew good cause to the contrary, on the 5th day of February next; provided, that a copy of this order, together with a copy of the foregoing petition be served on her on or before the 26th day of the present month.

The plaintiff *William Brewer*, by his petition, stating that *Elizabeth Murdock* had failed to pay the purchase money as ordered, prayed that he might be considered as the purchaser of the forty-four acres of land according to the terms of the sale as reported by the trustee; and that his claim might be set off against the net amount of the purchase money.

9th February, 1828.—BLAND, *Chancellor*.—It appears that *Elizabeth Murdock* has been served with copies as required, and yet has shewn no cause. It is true that a trustee, or any one acting as such is not allowed, without divesting himself of that character, to purchase at a sale made by himself. But the policy of the

the trustee not to receive a bid of him before returned as the purchaser. Since the order of exclusion the terms of sale are modified, requiring the purchaser to give security at the time of the sale, to the satisfaction of the trustee, for the payment of the purchase money. And as this change will prevent those from bidding who will not, or cannot give the security, the order therefore passed on the 28th of May last, so far as it relates to Hector Scott's prohibition to bid, be, and the same is hereby rescinded. And to avoid an interposition so as to defeat an effectual sale, it is now *Ordered*, that unless he who is the highest bidder shall comply with the terms of the sale, the person next bidding shall be returned as the purchaser, on his complying with the terms, and so on in succession, until the terms are complied with. As the property has been returned as sold to one person, who found fault with the sale, having had sufficient time to inquire into the title, should he be returned as the purchaser, he must be considered buying the right such as it is, and no future objections will be received on the insufficiency of the title.—*M.S.*

law which forbids that; because of the strong temptation to fraud, where there is such a conflict of duty and interest; and because one man should not be permitted to take advantage of the necessities of another, is not infringed by allowing a plaintiff, a creditor, or a mortgagee to purchase at a sheriff's sale, or at a sale made by a trustee of this court; as, in such case, the party is proceeding adversely against his debtor, not by any private dealing, but by the public process of the law, in which he himself is not the seller, but an impartial executive officer or agent of the court. (e) With regard to the discount asked for, it is certain, that the trustee, appointed by the decree to make the sale, can dispose of the purchase money in no way, without the express authority of the court. (f) But, as the mortgage debt, the recovery of which is the sole object of this suit, has been established by the decree for a sale, there can be no impropriety, after first deducting the commissions, expenses and costs, in ordering the proceeds to be, at once, applied in satisfaction of that debt, by discount with the mortgagee as purchaser, or in any other way. And *Elizabeth Murdock* having failed to comply with the terms of the contract of sale, *William Brewer*, the plaintiff and mortgagee, must be received as the purchaser, and be allowed the discount as prayed accordingly.

Therefore, it is *Ordered*, that the sale to *Elizabeth Murdock* be and the same is hereby rescinded; and the petitioner *William Brewer* be, and he is hereby deemed, taken, and in all respects to be considered as the purchaser of the property in the proceedings mentioned. And the trustee is directed, on the payment by him of all the costs and commissions of this suit, to discount the balance of the amount of the purchase money from the amount of the said *William Brewer's* claim.

After which *William Brewer*, by petition, stated that he had complied with the order of the 9th of February, and therefore prayed to have the possession of the property of which he had so become the purchaser, delivered to him.

11th March, 1829.—BLAND, Chancellor.—*Ordered*, that the said *Elizabeth Murdock* forthwith deliver possession of the property in the petition mentioned to the said *William Brewer*, or shew good cause to the contrary on the 28th instant; provided,

(e) *Stratford v. Twynam*, 4 Cond. Cha. Rep. 193.—(f) *Bennett v. Hamill*, 2 Scho. & Lefr. 581.

that a copy of this order, together with a copy of the foregoing petition, be served on the said *Elizabeth* on or before the 18th instant.

After which the matter standing ready for hearing, and the solicitors of the parties having been heard, and no sufficient cause having been shewn why the prayer of the petition should not be granted, it was on the 30th of March, 1829, *Ordered*, that an injunction issue commanding the said *Elizabeth* to deliver possession of the property to the said *William Brewer*. Which not having been obeyed, a *habere facias possessionem* was awarded, and he was put into possession. Afterwards the auditor stated an account, which was finally ratified on the 22d of October, 1829, from which it appeared, that there was still a balance of the mortgage debt left unpaid by the proceeds of the sales.

After this case had been thus terminated as against *Elizabeth Murdock*, *William Brewer*, on the 20th of April, 1830, filed his bill against *Gilbert Murdock*, in which *Brewer* stated, that under the before mentioned decree of the 2d of October, 1826, and order of the 9th of February, 1828, he had purchased and become seized of the tract of land in those proceedings mentioned; that this defendant *Gilbert Murdock* had erected, and persisted in continuing to erect, a fence, so as to include a part of the land so purchased by him, this plaintiff; and that he had brought an action of trespass *quare clausum fregit* against *Gilbert Murdock* to recover damages for the trespass so committed, which action was still depending. Upon which he prayed for an injunction to prohibit the defendant 'from continuing the said fence, and enjoining him to remove the said fence already erected;' and for such other relief as the nature of the case might require. To this bill there was subjoined an affidavit of the plaintiff in the usual form. Upon which it was submitted.

20th April, 1830.—BLAND, Chancellor.—'The plaintiff prays for an injunction of a more extensive operation than can now be granted. He asks not merely, that things may be preserved in their present condition, but that some things which have been done may be undone; in other words, he asks the court now, and at once, to put forth in his behalf its remedial as well as its conservative powers.

But before imputed wrong can be removed, or any thing like

commutative justice can be administered, it is the duty of the court to give the party complained of an opportunity of being heard. To restrain a defendant from making any abusive use of the property in question; or from disposing of it past recall, amounts to no more than the imposition of a temporary limitation upon the free exercise of his rights, even if it should eventually appear to be entirely and rightfully his; which is quite as far as any court can go in the first instance; and as preparatory to a fair and beneficial hearing and final adjudication. To order a defendant to pull down or remove any erection would be obviously and directly to deprive him of a portion of that which then, at least, appeared to be his property, and was so claimed by him; and that too, at once, and without a hearing; for a house, a fence, or the like has a value, as such, which would be totally destroyed by its being pulled down, and which does not belong to the materials of which it was composed, however carefully they may be preserved.

The only object of the conservative power of the court, as expressed in an injunction of this kind, is, not to determine any controverted right, but merely to prevent a threatened wrong, or any further perpetration of injury, or the doing of any act thereafter whereby the right to a thing may be embarrassed, or endangered, or whereby its value may be materially lessened, or the thing itself may be totally lost. The principal object of an injunction, in cases of this kind, is to prevent irreparable injury by preserving things in their present state; but if the injunction were to order any thing to be pulled down or undone, it is obvious, that it might be, itself used as a means of producing that very kind of irreparable injury to the defendant which the bill charged him with being about to perpetrate against the plaintiff. (g)

There are, however, some cases in which an injunction has been so framed as, apparently, to approach to the very verge of ordering a thing to be undone. As where the regular flowing of a stream of water had been so interrupted by the making, or the interposition of occasional breaches or obstructions, as to be very injurious to the use of it for a canal, or for propelling a mill; an injunction which commanded that the party should not thereafter *continue to cause* the stream to flow thus irregularly, seemed indirectly to command, and no doubt did involve the repairing of the breaches, and the removing of the obstructions which had caused

(g) Duvall v. Waters, 1 Bland, 569.

the injurious irregularity complained of. From the peculiar nature of those cases, however, it is obvious that the existing and natural state of things could not otherwise have been preserved. The injunction, in those cases, did not command any thing to be *undone*, but merely that an injurious irregularity should not be any longer *continued*, considering the continuance of the act as a *repetition* of it. (*h*)

This court has always been governed by these principles in granting injunctions in so limited a form, as expressly, or in terms to require no alteration in the existing state of things, or any thing to be undone or restored; except in so far as a restoration may consequentially follow as a necessary result of the merely restrictive operation of the injunction. As in cases between tenants in common, the court may, under some circumstances, by an injunction or the appointment of a receiver, prevent one of them from taking all the profits to the absolute and total exclusion of the other; the obvious and necessary consequence of which must be to *restore* the plaintiff prospectively to the enjoyment of an important benefit. And yet the injunction itself could not command the defendant to undo any thing he had done; to re-instate any thing he had altered; or to restore to the plaintiff any thing of which he had been deprived. (*i*)

(*h*) *Ryder v. Bentham*, 1 Ves. 543; *Robinson v. Byron*, 1 Bro. C. C. 588; *Anonymous*, 1 Ves. jun. 140; *Lane v. Newdigate*, 10 Ves. 193; *Blakemore v. The Glamorganshire Canal Navigation*, 6 Cond. Cha. Rep. 544; *Eden Inj.* 233.—(*i*) *Tyson v. Fairclough*, 1 Cond. Cha. Rep. 386.

NORWOOD v. NORWOOD.—This bill was filed on the 11th of May, 1796, by Edward Norwood against Samuel Norwood. It states that Edward Norwood, the father of the parties, by his last will and testament, bearing date on the 25th of March, 1770, devised as follows:

‘I give and bequeath to my dearly and well beloved wife Mary Norwood, all that part of a tract or parcel of land called *United Friendship*, lying between Dry Run and Persimmon, and northward as far as the line of the land called *The Forest*, for and during her natural life and no longer. I give and bequeath to my son Edward Norwood and my son Samuel Norwood, all the tract of land whereon I now dwell called *United Friendship*, to be equally divided between them, their heirs or assigns, forever; but in case either of my said sons should die before they come of age, then it is my will that the survivor shall have and possess the whole tract, but not to disturb my wife during her life: and if it should so happen, that both my sons Edward and Samuel, should die before they come of age, then it is my will, that it shall be equally divided between my three daughters and youngest son, viz: Ruth Norwood, Elizabeth Norwood, Mary Norwood, and John Norwood, to them, their heirs and assigns, forever.’

Some time after which the testator died, and on the 21st of January, 1772, his will was proved according to law. By virtue of which devise, these parties became

Let writs of *subpœna* and injunction issue, as prayed by the said bill of complaint; except that the defendant is not to be enjoined as prayed to remove the said fence heretofore erected.

seized and possessed of the said land as tenants in common, and used the same accordingly until the year 1785, previous to which period, sundry valuable improvements had been erected on a part of it by the plaintiff; that these parties in the year 1784, by their joint labour and expense, made a public road through the said land, from Baltimore to the river Patapsco, where they had established a ferry, erected a ferry-house, &c.; which ferry was carried on by them jointly, and the net profits thereof divided between them weekly; that on the 12th of November, 1785, these parties entered into an agreement for a partition, whereby, that part on which the buildings had been erected was assigned to the plaintiff, and the other part, adjoining the ferry, was allotted to the defendant, that certain persons were thereby nominated and appointed to make the division, so that each should have an equal quantity of wood and land; and to adjudge and ascertain the difference of soil; and that proper judges should be appointed to ascertain the value of the buildings on each part, which was to be accounted for in the settlement between the parties; in which division and valuation, however, the ferry and its appendages, were not to be taken into consideration, or valued and divided; but to remain as joint property, and the profits thereof to be equally divided between them; that on the 12th of December, 1785, the referees awarded, that the defendant should pay to the plaintiff the sum of £400, for the difference of soil, which sum the plaintiff agreed to take; that three skilful persons were chosen to value the improvements, who awarded, that the improvements on the plaintiff's part amounted to £1,290 5s. 2d. and those on the defendant's part amounted to £215 0s. 0d.; so that the balance due from the plaintiff to the defendant, on account of improvements, amounted to the sum of £537 12s. 7d. which were exclusive of the ferry and its benefits; that in pursuance of the said agreement the parties entered upon, and became severally possessed of the parts of the tract called *United Friendship*, according to the division thus made; and had ever since so occupied and enjoyed the same, except the ferry, which was then, and had always since, been held by them as tenants in common, for their joint benefit; that in order to have a final settlement of all their dealings and transactions, certain persons were chosen and appointed to arbitrate, settle, and adjust all claims and demands between them, who met accordingly, on the 15th of June, 1787, and awarded a balance to be due to the plaintiff of £168 0s. 4d. after allowing and crediting the before mentioned sums, awarded for differences of soil and improvements; which adjustment was always acquiesced in, and never called in question by the defendant until about the month of May last, that these parties had jointly held the ferry, and divided the profits thereof weekly from the time it was established until the 6th of September last, when the defendant, without any just cause, and in violation of their agreement, had disturbed the plaintiff in the possession of his moiety, taken the whole to his own use, and prevented the plaintiff from recovering any part of the profits thereof; that the average monthly profits of the ferry amounted to £35 or £40, to one-half of which the plaintiff was entitled.

Whereupon it was prayed, that the defendant might be compelled to execute deeds of partition, according to the terms of the said division; that the defendant be ordered to account for the rents and profits of the ferry; that the plaintiff might be quieted in the possession and enjoyment of his half-part thereof; and that he might have such further and other relief as the nature of his case might require; and that a writ of injunction might be granted, directed to the defendant, 'commanding him

The defendant answered the bill, and denied the right of the plaintiff to the land on which the fence, or any part of it, had been

to stay, surcease, and forbear from molesting or disturbing the plaintiff, in the peaceable possession and quiet enjoyment of one moiety and half-part of the said ferry and ferry-house situate on the said land, called *United Friendship*, lying in Baltimore county, and the appendages to the same belonging; and also injoining and prohibiting him from preventing the plaintiff from receiving his half-part of the profits of the said ferry, called Patapsco Upper Ferry, weekly and every week, according to the agreement between the parties aforesaid, till the court should take further order in the premises.'

11th May, 1796.—HANSON, *Chancellor*.—The Chancellor has examined this bill. It appears to him, that an injunction granted on filing a bill, and before hearing of the defendant, never does and never ought to go further than to prohibit the defendant from *doing something* which appears, from the statement of the bill, to be against equity and good conscience, and prejudicial to the rights of the complainant, for instance, to stay waste or proceedings at law, &c. &c. that is, to suspend the defendant, &c. An injunction directing the defendant to put the complainant into possession of a benefit, or what is stated to be his right, is never to be granted, as the Chancellor conceives, until a final hearing of the whole merits of the cause, unless in the case of a right established by record. The statement of the bill is imperfect; but the Chancellor supposes, from the nature of the application, that the conduct of the ferry, and the possession thereof, is in the defendant. If so, the injunction prayed is, in effect, to direct the defendant to settle weekly with the complainant, and pay him one-half of the profits, which indeed are, and must be, uncertain; that is to say, the injunction is to put the complainant into possession of a benefit. The complainant does not pray that the defendant be prohibited from carrying on the ferry, &c. &c. If the conduct of the ferry be in the hands of the complainant, he needs the aid of this court as prayed. In short, it appears to the Chancellor that he cannot, with propriety, grant the injunction on the bare statement of the complainant and his vouchers, considered *ex parte*. Whether or not an injunction may be granted or decreed, on the final hearing, is a question which may hereafter be determined.

The next day the bill was, with some suggestions and references, again submitted to the Chancellor for re-consideration.

12th May, 1796.—HANSON, *Chancellor*.—The Chancellor has again considered this case. He finds that an injunction has been granted by Chancellor Rogers, in the case of *Dallam v. Onion*. The principle on which it was there granted, must apply to the present case; and although the Chancellor is satisfied that, in a case like the present, an injunction was never granted in England, and he retains the opinion delivered yesterday, it is *Ordered*, that injunction issue as prayed by the bill. At the same time he declares, that he shall most severely punish a violation of the injunction, in case the defendant shall fail to make it appear that he has no right to the benefit he claims.

The defendant, by his answer filed on the 19th of September, 1796, admitted the devise, the possession of the land, and the establishment of a ferry, the profits of which were, for some time, divided weekly as stated; but denied that a public road had been opened to it by them; and alleged, that the road to the ferry, then used, ran through his land and was used by his permission, and not from any establishment of it by law; that there never was any ancient road to the ferry, but that the ancient

or was about to be erected. And the case was thus permitted to stand over to await a decision in the action at law. (j)

road was considerably above, and crossed a ford of Patapsco falls, and being more circuitous, was the reason for permitting the then road to be opened; that the boat, &c. procured at their joint expense, had long since been consumed, and the boat and appendages then used had been procured by the defendant, and the ferry carried on at his sole expense, since his refusal to permit the plaintiff to participate in the profits; that as the widow of the testator was entitled to a life estate in the land on which the buildings had been erected, it was agreed between these parties, that new buildings should be put up at their joint expense, which improvements were made accordingly as stated; that it was agreed that a partition should be, and it was made, with a valuation as stated; that there were a variety of dealings and transactions between them, of which there never was any final adjustment as stated, or in any other manner whatever; that he was justified in taking to his sole benefit the profits of the ferry as then used, inasmuch as it had been erected and supported at his sole expense, and as the plaintiff was largely indebted to him, he had a right to apply the proceeds of the ferry to the payment thereof; that the plaintiff had been permitted to receive a moiety of the profits of the ferry since the service of the injunction; that the defendant had since erected a ferry upon his own land, at his own expense, lower down the river, in no wise connected with or dependent upon the ancient ferry on the plaintiff's land; and that the agreement between them to divide the profits of the ferry was not intended to be perpetual, but only for such time as the boat, rope, and appendages of the ferry, erected at their joint expense, should last.

On the 15th of November, 1796, it was agreed that the bill and answer might be amended. Whereupon the plaintiff filed an amended bill, in which he stated, that since the issuing of the injunction the defendant had, in fraud of the agreement between them to have a joint ferry, set up a new ferry, on the tract of land called *United Friendship*, about twenty yards below, expressly with a view to injure and defraud the plaintiff; that the road to both ferries was the same; and the custom being to and from the same places, was the same to both; that in the year 1783 these parties, to secure to themselves the benefit of a ferry for their mutual benefit, obtained a lease of one acre of land as a landing place, on the opposite side of the river, from the Baltimore company, for ninety-nine years, renewable for ever, for which the rent had been regularly paid, which was strong evidence that the ferry was to be perpetually kept up by them for their joint benefit; notwithstanding which the defendant had since bought or leased a piece of ground, as a landing, about twenty yards below the said acre, in order to defeat the advantages resulting from the said lease, to the manifest injury of the plaintiff. Upon which it was prayed that the defendant might be compelled to abate and stay the ferry so by him lately erected, and be prohibited from erecting any other ferry on the tract of land called *United Friendship* than the joint one, which had been previously established; and that the plaintiff might have such other and further relief as the nature of his case might require.

To this amended bill the defendant, on the 14th of January, 1798, put in his answer, in which he said, that he admitted he had, since the service of the injunction, erected and supported a new ferry over Patapsco river, on his own part of *United Friendship*, and had deserted the former ferry; which was not done with a view to

On the 14th of May, 1830, the plaintiff filed his petition, on oath, with the affidavits of three other persons in support of the

defraud the plaintiff, but to increase the value of the defendant's own property; that he had purchased, and was then the sole owner, of two acres of land, on the west side of Patapsco river, which he used as a landing to his newly erected ferry; that the Baltimore company had loosely agreed to lease an acre of ground to these parties, but this defendant never conceived that any permanent interest was contracted for as stated, but that it was a matter of temporary accommodation, from which these parties and all others might be, at any time, precluded by the Baltimore company.

On the 29th of March, 1798, the plaintiff, by his petition, stated, that it was necessary for the illustration of the matters in dispute, to have the tract of land called *United Friendship* laid down, together with the division thereof, the improvements on their respective parts, and the ferry. Whereupon he prayed for an order of survey, &c.

29th March, 1798.—HANSON, Chancellor.—*Ordered*, that the surveyor of Baltimore county lay down and return a plot and certificate of any land which he may be instructed by either party to lay down, for illustration of the dispute between them.

Under this order a survey was made, and a plot and certificate returned accordingly; and the commission, which had been previously issued, was also returned, with the depositions of sundry witnesses, and some documentary evidence was also returned and filed on the 5th of May, 1798. After which the case was set down for hearing on the 8th of November, 1798.

But on the 30th of October, 1798, the defendant, by his petition on oath, stated, that since the return of the commission and the survey, he had discovered that the land whereon the ferry-house, landing, &c. stand, was not included within the lines of the tract called *United Friendship*, and that he had taken it up as vacant land, agreeably to the rules of the land office; that it was essential to have some additional locations made, which were not known to him until since the return of the commission. Whereupon he prayed, that the hearing might be postponed, &c.

5th November, 1798.—HANSON, Chancellor.—It is stated to the Chancellor, on behalf of the complainant, that in executing the order for laying down lands for illustration, the surveyor hath refused to make out the complainant's illustrations on the plots whereon he hath made out, or is about to make out the defendant's illustrations; and that the said surveyor hath declared to the complainant, that he will not do otherwise than return a separate plot for each party.

The Chancellor thinks proper to declare it to have been his expectation, in passing the said order, that only one plot and certificate should be returned to this court, on which plot should be laid down any lands which either party should instruct him to lay down. It hath always been the practice for surveyors, on similar occasions, to lay down lands for both parties on the same plot; and it appears to the Chancellor, that unless the lands laid down, by the directions of each party, shall be contained in one plot, it will be extremely difficult, if not impossible, that the matter in dispute can be illustrated.

It is therefore *Ordered*, that the surveyor of Baltimore do lay down and return to this court, one plot and certificate containing all the lands which both or either of the parties shall direct him to lay down for illustration of the matter in dispute. But nothing herein contained is intended to restrain the surveyor from gratifying either of the parties who shall think proper to direct him to make an additional plot. It is further *Ordered*, at the instance of the complainant, that the decision of this cause be postponed to the twentieth instant, and that it shall be heard on that day; pro-

allegations of his petition, in which he stated that the defendant had discontinued the erection of the fence until the 8th instant,

vided a copy of this order be served on the defendant or his solicitor, at any time before the tenth instant.

Under this order a further survey was made, the lands laid down for illustration as required, and a plot returned; after which the case was set down for hearing, and brought before the court.

5th February, 1799.—HANSON, *Chancellor*.—The said cause being set down for hearing, and being debated by the counsel in writing, the bill, answer, exhibits, depositions, and all other proceedings, were by the Chancellor read and examined, and the written arguments of the counsel on each side were by him read and considered.

The complainant had three objects proposed by the bill as it stands amended—*first*, to have an agreement for the division of the land enforced; *secondly*, to have an account of the profits of a ferry supposed to be on the land in the bill mentioned, conformably to the said agreement, and to be secured in the receipt of one-half thereof in future; and, *thirdly*, to have the suppression of another ferry, set up near the common ferry by the defendant.

It seems that the defendant considered it of importance, to prove that the ferry-house, &c. are not, as was supposed at the time of the agreement, on the tract of land which was to be divided. He therefore obtained an order for laying down lands for illustration. But if the Chancellor conceived it of consequence to have the precise running of the land ascertained, he certainly could not, without violating the well known established principles of this court, undertake to decide on the location, but would refer it to a jury. He cannot, therefore, otherwise than regret, that the parties have incurred an unnecessary expense. It appears that they were in possession of the ferry, landing, &c. as part of the tract of land devised to them by their father; that they agreed upon a division of the land as possessed; and that they have since held, according to the agreement. This court cannot then do otherwise than say, that the agreement shall be enforced; and that the complainant is entitled to an account of the ferry, as prayed by the bill.

As to the *third* object of the bill, *viz*: to have a suppression of the ferry which is alleged to have been set up by the defendant contrary to the spirit of the agreement, and the rights of the complaint, there are not perhaps, sufficient circumstances thereto relative brought before the court, to enable the Chancellor to decide. But supposing the case to be as he conjectures, there is no decision that he knows of, in the books, or in the records of this court which can be thought exactly in point. He conceives, however, that the question may be decided by common sense, without the aid of learning and authority. If two persons agree to set up, at their joint expense, a ferry for the accommodation of travellers on a certain road, and the ferry is accordingly set up; and then one of them sets up another ferry, for his own emolument, at a distance of twenty, thirty, fifty, or one hundred yards from the old ferry to accommodate the same set of travellers; who is there that will not conceive the act to be a direct violation of the rights and interests of his partner? But if the new ferry be only at a small distance, and yet is only for the accommodation of travellers on another road, who would not otherwise cross at the old ferry, it cannot be supposed, that the partner is entitled to have it suppressed. Now, whether the new ferry, in the present case, be of the latter or former kind, does not, as has been intimated, clearly appear. It is impossible for the Chancellor to proceed immediately to a final decree; and therefore the last question may remain for further consideration, and perhaps further preparation relative thereto, may yet be made.

when a certain *William Murdock* and *Zachariah Johnson*, of the city of Annapolis, well knowing that the said injunction had been

Decreed, that the defendant account with the complainant for one-half of the profits of the ferry in the bill mentioned, from the time when the defendant took, and so long as he has retained the whole profits thereof; that the parties shall further account with each other relative to all debts whatever, arising on the agreement aforesaid or otherwise. That the auditor state the account or accounts between the parties on notice to them given, and from the proofs in this cause, or other competent legal proofs which shall to him be produced; and that having stated the account or accounts he shall report and return the same, subject to the exceptions of either party, and to be done with as shall seem just.

N. B.—The complainant's bill alleges, that the new ferry is set up at a distance of about twenty yards. The defendant's answer, says, that the new ferry is lower down, on his own land. But whether there are different roads, &c. as before mentioned, is not yet established.

On the 28th of March, 1799, the defendant, by his petition, on oath, stated, that for many years from the time of the death of his father, the accounts of the profits and expenditures of the land called *United Friendship*, to which the ferry was alleged to belong, were kept in certain books of accounts, or entries, which contain also the general accounts between them, as well relative to the said farm and ferry, as other transactions concerning their father's estate, and their common concerns, which he cannot otherwise identify than by reference to their subject matter, were left in the possession of the plaintiff, and were then in his possession or under his control; that this defendant expects to prove by them various charges, for which he has no other proof. Whereupon, it was prayed, that they might be produced before the auditor, &c.

25th March, 1799.—HANSON, *Chancellor*.—*Ordered*, that the complainant do forthwith produce to, and lodge with the auditor for the purpose of his stating an account between the parties, every book in his, the complainant's possession, which contains any entry, memorandum, or statement, relative to the matter in dispute between them; and to the account to be stated in conformity to the decree in this cause lately passed.

On the 13th of April, 1799, the auditor filed a report, in which he said, that in obedience to the decree, after having given notice to the parties, and having received what further testimony they chose to produce, he had stated accounts Nos. 1, 2, 3, 4, and 5. That account No. 1, was a copy from the books of complainant, commencing in the year 1775, which appeared to have been adjusted and settled by arbitrators, and after charging interest, the balance struck on the 14th of June, 1787, which then amounted to £160 0s. 4d. That for this account there did not appear any other evidence, or voucher, except the waste books and ledger, lodged by the complainant where the original entries appeared to have been made. That No. 2, was an account of the ferriages received by the complainant for his proportion of tolls as entered in his cash book monthly, commencing on the 23d of May, 1786, to the 31st of October, 1796. And from this view of the profits, the auditor had made an estimate on the back of said account of the probable monthly receipts at said ferry. That No. 3, was an account stated from the balance on account No. 1, which was stated in that manner, in order that the private accounts, and the account for the profits of the ferry might be distinct. That in this account, the defendant had credit for his half of £145 7s. 9½d. being sundry receipts which he had exhibited, and

issued, and served on the said *Gilbert Murdock*, and acting as his agents, and with his consent, secretly and with great haste con-

which do not appear to have been entered on the complainant's books; they appear to be accounts against E. and S. Norwood; but how far the complainant was concerned in the whole of the said debts, the auditor cannot say. The balance due the complainant, on this account, including interest to this day, amounted to £68 18s. 2d. That account No. 4, was the complainant's proportion of ferriages from the 6th of September, 1795, to the 23d of June, 1796, with interest thereon to this day, amounting to £164 9s. 2d. That account No. 5, was a further account of ferriages from the 1st of November, 1796, when the defendant moved the ferry-boat, &c. from the old ferry to the new ferry erected on his own landing, amounting to £554 1s. 5d. exclusive of interest.

25th May, 1799.—HANSON, *Chancellor*.—On the complainant's motion it is *Ordered*, that the auditor's report and the accounts by him stated in this cause, shall be approved, ratified, and confirmed; unless exceptions thereto be filed on or before the 1st day of August next; provided a copy of this order be served on the defendant before the 5th day of July next.

On the 27th of July, 1799, the defendant filed exceptions to the auditor's report; *first*, for that the account, No. 1, was not an account settled, or acquiesced in by the complainant or defendant, and is erroneous and unjust; and was so proved by the said Zachariah M'Cubbin, particularly in the item of £400, charged by the defendant for difference of soil, &c. which was the whole difference of soil, &c.; and one-half whereof only ought to have been charged to the defendant. *Second*, for that the auditor had no proof of the account of ferriages received and charged to the defendants, but written accounts of the complainant's, and which were in no wise authenticated. *Third*, for that the auditor had not made allowances to the defendant which he was entitled to, and which were specified in the account filed by him.

1st August, 1799.—HANSON, *Chancellor*.—On complainant's motion, *Ordered*, that the defendant's exceptions be heard on the first week in the following term; provided a copy of this order be served on the defendant, or his solicitor, at any time during the present month.

A copy of this order having been served, the matter was submitted for determination.

14th October, 1799.—HANSON, *Chancellor*.—The order passed on the first day of August last having been duly served, and no argument being offered on the defendant's part, and there being a submission on the part of the complainants, the Chancellor considered the exceptions of the defendants; and it is adjudged and *Ordered*, that the same be overruled, and that the report of the auditor, and the accounts by him stated, be approved, ratified, and confirmed.

This order having been passed upon a submission of the matter, made under a misapprehension as was alleged, the case was again brought before the court.

5th November, 1799.—HANSON, *Chancellor*.—The complainant's counsel having admitted that it had been understood between him and the counsel of the defendant, that the argument on the exceptions, which had been appointed to take place during the first week of this term should be postponed; and that in consequence thereof the said defendant's counsel had failed to attend at the appointed time; and the Chancellor having, on the idea of the said counsel's abandoning the exceptions, which were not sufficiently pointed and particular, passed an order ratifying the auditor's

tinued, and completed the erection of said fence, in direct violation of the said injunction. Whereupon he prayed for an attachment

report; it was determined that the said order be rescinded, and that the said exceptions be debated. The argument of the counsel on each side was accordingly heard and considered.

The present cause appears to the Chancellor to be one of those cases in which it is extremely difficult, if not altogether impracticable, for him to do complete justice without violating strict law, which he is not at liberty to dispense with, and departing from established principles. He therefore feels himself under embarrassment, and to relieve himself from it, as well as to make an end, in the most eligible manner, of a contest, which hath been attended with much expense, delay, and vexation, he thinks proper, before he proceeds to a decision on the argument, or gives any intimation of his opinion relative to its merits, to make a proposition, on which he requests the parties immediately to determine. His proposition is, that the parties, by writing, to be here filed, shall submit to him, as an arbitrator, all matters in dispute between them in this cause; and that an order be thereon passed by consent, for submitting as aforesaid, and that a decree be passed on his award, when returned; and that each party shall be at liberty, notwithstanding, to appeal; in order that the Court of Appeals may reverse, or change his decree, in case his award shall be liable to such objection or objections, or contain such error or errors as might be deemed sufficient to set aside an award made by any other person.

The parties having considered this proposition and refused to accede to it, the case was again submitted.

15th November, 1799.—HANSON, *Chancellor.*—The complainant having verbally refused to comply with the proposition made by the Chancellor on the 5th instant, the Chancellor is under the necessity of deciding according to what he conceives the rules of law, and the established principles of this court.

If the settlement made by the persons who are stated to have been appointed by the parties to decide between them, could be considered as a regular, final and complete award, it would not, in this court, avail the complainant. It is notorious, that this court never compels the performance of an award, merely as such, unless made under an order on the submission in court of the parties. But the said settlement cannot be considered as an award. For, supposing that a submission to the said persons had been regularly made, it does not appear that the said settlement was ever declared and delivered as an award. If the said settlement is not to be considered as an award, in what other way can it be considered as effectual? Can it be received as evidence, that on the day of its date the balance stated to be due to Edward Norwood, was actually due to him? No! It is expressly stated, that the settlement was made chiefly from the books of the complainant; and all that can be inferred from it is, that the said persons were satisfied, that there was a certain balance due on a certain day from the defendant to the complainant. The second and third exceptions not having been insisted on by the defendant; and his counsel having in open court expressly declared, that they would not insist upon the same.

It is hereby adjudged, that the first exception of the defendant be, and it is hereby admitted to be good; and that the second and third exceptions of the said defendant be, and they are hereby disallowed. It is further *Ordered*, that the auditor re-state the account No. 1, on such evidence as has been or shall be produced, not considering the settlement aforesaid as evidence. But it appears to the Chancellor, that the full sum of £400 for the difference in value of the land, &c. ought to be charged to the defendant, the persons appointed to value having by plain, unequi-

against them, and that the said *Gilbert Murdock* might be compelled to remove the part of the said fence, erected since the service of the said injunction.

vocal language, awarded it to be paid by him for the said difference. He is therefore to be charged with it.

On the 31st of January, 1800, the auditor, in obedience to this order, reported, that he had re-stated an account No. 6, between the complainant and defendant, on which there appeared due to the defendant £258 17s. 11d. including interest. That from exhibits filed by the defendant, he had stated another account, No. 7, on which there was due to the defendant £63 6s. 4d., including interest. But that the evidence from which it had been stated, were receipts for money stated to have been paid by the defendant on account of E. & S. Norwood, without any additional legal proof of the facts, as to the actual payments of the defendant, or the hand-writing of the persons to whom such sums were stated to have been paid; that he had therefore stated the account No. 7, distinct from account No. 6. That he had stated in No. 8, a summary of the testimony taken before him, and from the additional testimony and exhibits filed by the parties; on which he had made sundry remarks, and stated his objections to such parts thereof as ought to be rejected. That the complainant had filed three waste books, one cash book, and one ledger marked E. N. No. 1; E. N. No. 2; E. N. No. 3; E. N. No. 4; and E. N. No. 5; but from which the auditor had made no extract or charge; those books not being proved or admitted as legal testimony by the defendant. They appear to have been filed to prove the defendant's knowledge of the accounts therein stated, many of the entries having been made, as proved by the deposition of a witness, in the hand-writing of the defendant. That he had also stated account No. 9, wherein he had brought the balances due the complainant on the accounts Nos. 4 and 5, for the ferry, and the balances due the defendant on accounts No. 6 and 7, which left a balance due the complainant of £456 12s. 8d., including interest to that date. That he had also stated account No. 10, taking the balance due the complainant for the ferry, and the balance due the defendant on account No. 6, leaving out No. 7, in case it should not be allowed, which left a balance due the complainant of £519 19s. 0d., including interest.

To this report of the auditor, the plaintiff, on the 19th of April, 1800, excepted; *first*; for that the auditor hath charged the complainant with the sum of £63 6s. 4d., being the amount of account No. 7, although there is no proof to establish any of the items contained in said account; and therefore, the same ought not to have been allowed; *second*, for that the auditor hath omitted to charge the defendant with sundry sums of money, and with sundry articles properly chargeable in account. All of which are particularized and enumerated in the books of accounts, marked E. N. No. 1, to E. N. No. 5, inclusive; although the defendant, in sundry instances, hath charged himself therewith, in his own hand-writing; *third*, for that the said auditor hath charged the complainant in account No. 6, with the sum of £537 12s. 7d., for difference of the buildings, without allowing him any credit for materials found, and for payments made to workmen for erecting the same; *fourth*, for that the said auditor hath charged the complainant with the amount of the accounts Nos. 6 and 7; although the said accounts originated and accrued more than three years before the filing of the original bill in this cause. And therefore, now barred by the act of limitations. Which said act of limitations, the complainant insists on, in bar to the said accounts, and all other accounts between the said parties, existing for three years previous to filing the said original bill in this case.

Gilbert Murdock, by his answer on oath to this petition, positively denied the whole charge of a breach of the injunction

And on the same day, the defendant also excepted to the same report of the auditor; *first*, for that the auditor has not charged the complainant with the defendant's share of his father's personal estate, decreed against the complainant as executor of his said father, by the Orphans Court of Baltimore county; *second*, for that the allowances made to the complainant, per accounts of ferriages, Nos. 4 and 5, are not authorized by the proof in the cause, but are conjectural; *third*, for that the auditor has refused, against proof in this cause, to allow the defendant for thirteen years' ferriages as manager of the farm on *United Friendship*; *fourth*, for that the auditor has refused to allow to the defendant the credit side of the account C., No. 5, proved by William Hammond and Zachariah McCubbin, to have been admitted by the complainant, and also established by the defendant by other proof in the cause; *fifth*, for that the auditor, misconceiving the decision of the Chancellor, has rejected evidence to establish the truth of the facts stated, and items entered on the credit side of the said account C., No. 5; *sixth*, for that the auditor has refused to make to the defendant an allowance of the several items established and proved against the complainant, by John Dorsey, exhibit B.; Archibald Moncreiff, exhibit C. C. and E. E.; William Russell, exhibit D. D., and also the items proved by Elam Bailey, Allen Dorsey, and Samuel Godman.

21st May, 1800.—HANSON, *Chancellor*.—The day appointed for arguing the exceptions to the auditor's report having arrived, and the Chancellor being ready to examine said exceptions, and to hear the arguments; neither the defendant nor his counsel appeared. On account of the absence of said counsel, the defendant, perhaps, had he been present, might have had the cause adjourned; but the complainant and his counsel being anxious for a speedy decision, prayed the Chancellor to proceed without hearing any argument, or receiving any observations on either side. The request appearing, under all circumstances of the case, to be reasonable, the Chancellor has accordingly examined the said exceptions, with all the papers and proceedings referred to, and has had certain explanations from the auditor, without which, it was extremely difficult, if not impossible, to understand the merits of the exceptions.

The Chancellor considered first, the complainant's exceptions, *first* and *fourth*. He conceives that the complainant is entitled to the bar of the act of limitations against all the articles in accounts Nos. 6 and 7, except the two last articles in No. 7, which appear to be charged within the three years next preceding the filing of the bill. The manner in which the complainant has claimed the benefit of the said act, appears to be proper. It was indeed the only manner in which, under the circumstances of the case, he could have claimed it. As to the said two articles in No. 7, it appears to the Chancellor that they are not sufficiently proved. The said accounts, therefore, Nos. 6 and 7, ought to have been wholly rejected by the auditor, except the article of £1 10s. 0d., charged for the complainant in No. 6, which, as the auditor states, was admitted by the complainant. *Second*, as to the second exception, it appears to the Chancellor indefinite and uncertain. It does not specify the money and particular articles chargeable, as it says, in account. Is the Chancellor expected to go all over the five books referred to, and to find out from conjecture which are the particular articles meant by the exceptions? Besides the said books not being considered as evidence for the defendant, the auditor states that he did not consider them as admissible for the complainant. The said exception is disallowed. *Third*, with respect to this exception, the auditor states, that there was

generally and particularly, and declared that neither *William Murdock* nor *Zachariah Johnson* acted as his agents, nor with his

no evidence of the materials found, except the complainant's books, which were not proved; and, upon the whole, the exception is disallowed.

The Chancellor proceeded to consider the defendant's exception; *first*, the auditor states, and the Chancellor perceives, that there is no evidence of this claim except the books of the complainant, which have been rejected as not being proved. The Chancellor perceives, indeed, that the credit by Edward Norwood to Samuel Norwood for £94 10s. 0d., is opposed to a charge against Samuel Norwood of a balance of £168 0s. 4d. The exception is disallowed. *Second*, it was right for the auditor to take the average of the ferriages; what else could he do? Would a jury in fixing damages require proof of each receipt? No! The exception is disallowed. *Third*, there is no proof of any agreement or understanding between the parties, that the defendant was to be allowed for managing. Besides, it seems that the complainant managed likewise. Upon the whole, the claim seems improper, and the exception is accordingly disallowed. *Fourth*, account C. No. 5, it seems is an account of debits only, taken from the account settled by the arbitrators, and entered in Edward Norwood's books. The auditor rightly conceived it proper, that those books, which, for want of probates were not allowed as evidence for him, should not be taken against him. They were entirely laid aside, as was also the award. *Fifth*, this exception is indefinite and uncertain. It specifies nothing. It does not appear that the auditor has rejected any legal satisfactory proof. The exception is therefore disallowed. *Sixth*, it does not appear to the Chancellor that any item or article due to the defendant, is established and proved against the complainant by any of the persons or exhibits mentioned in this exception; and it is therefore disallowed.

It is, thereupon *Ordered*, That the auditor correct his account between the complainant and defendant, or state a new account between them, agreeably to the opinions of the Chancellor and principles herein contained; and that having so done, he return the said account to this court, and that thereon the Chancellor will proceed to a final decree; that is to say, the account to be returned by the auditor shall not be liable to any exceptions; provided it be stated agreeably to the Chancellor's opinions aforesaid, and his decisions herein contained on the exceptions aforesaid of the complainant, and of the defendant. To admit new exceptions after what has passed, or to allow a correction or amendment of those exceptions on which the Chancellor has decided, would be unreasonable.

In obedience to this order the auditor, on the 22d of May, 1800, reported, that he had re-stated an account between the complainant and defendant, as directed, and there was due to the complainant £776 15s. 6d., including interest to the 31st day of January, 1800.

9th June, 1800.—HANSON, Chancellor.—The auditor of this court having stated and returned an account, agreeably to the opinions of the Chancellor, and the principles expressed in the order or written declaration, containing the Chancellor's decision on the exceptions of each party to the preceding report:

It is thereupon *Decreed*, that the last stated account and report of the auditor be confirmed; that the defendant pay unto the complainant the sum of £776 15s. 6d., which is stated by the auditor to be due on the 31st day of January last, from the said defendant to the said complainant; and the said sum shall bear interest from the said day until the time of payment or levying thereof; and the said interest shall

knowledge or consent, in the matter imputed to him. *William Murdock* and *Zachariah Johnson* answered severally on oath; they

accordingly be paid or levied. And it is further *Decreed*, that the agreement stated in the bill for dividing the land called *United Friendship*, shall be carried into effect; and that accordingly the defendant by a good deed, to be acknowledged and recorded agreeably to law, shall give, grant, bargain, and sell, release, and confirm, and convey to the complainant and his heirs, all that part of the said tract of land called *United Friendship*, which has long been and now is in the said Edward Norwood's possession, as stated in the bill and admitted in the answer, under the agreement aforesaid. And the said Edward in like manner shall convey to the said Samuel Norwood and his heirs, all the other part of the said *United Friendship*, now in possession of said Samuel, as stated in the bill and admitted in the answer. And the intent of this decree, conformably to the agreement of the parties, is, that the branch from the two sycamores, or from the place where they stood in case they are not now standing, near the mouth of the dry run, shall be the division line, until it intersects the road to the falls; that the next line for division, shall be the road towards Baltimore to the top of the hill; thence the dividing line shall run to the head line, so as to make equal quantity of wood and land to each party; and that the part of Edward Norwood shall be that part on which the new buildings stand.

The agreement aforesaid, for a division, does not contain such precision as might be wished, even with respect to the division of the land; but as the parties each state a possession for many years under the agreement; and by experience it can be made certain; and as justice cannot be done without enforcing the said agreement, or giving it validity, so far as may be, the Chancellor conceives, that to say it is such an agreement as this court cannot enforce, would be a disgrace to the court. Whether or not indeed, the court has jurisdiction; and whether or not it shall use its discretion in exercising that jurisdiction, must frequently depend on the mere circumstances, which distinguish one case from another. Let it only be considered what would be the situation of the parties in the present case, if the court should determine, that notwithstanding the agreement, the parties are to be deemed tenants in common, each liable to a suit for profits, &c. But as to the other part of the agreement, that the profits of the ferry be equal, it does not appear to the Chancellor, that it is definite and certain enough to ground a decree, definite and certain as every decree ought to be; that is to say, this court cannot pass a decree directing Samuel Norwood to provide such a boat, such and so many hands, such ropes and other materials, specifying and particularizing all, as might appear proper for carrying on the ferry to advantage. This court cannot do this, because the agreement specifies nothing; and because this court certainly cannot make, change or new model an agreement. But as nothing is more clear to the Chancellor, than that the meaning of the agreement was that each party should take one-half of the profits of a ferry to be carried on at the place where the ferry, which was the subject of the agreement, was carried on, or so near it, as to enjoy the custom which that ferry would have enjoyed; the Chancellor thought proper to decree as he has done with respect to the profits.

And it is further *Decreed*, that the defendant Samuel Norwood, be, and he is hereby enjoined to permit the said Edward Norwood to take and to pay to the said Edward weekly, one-half of the profits arising from any ferry, by the said Samuel carried on, at the place where the ferry mentioned in the bill was kept, or so near the place, as to take custom which would otherwise go to any ferry kept at said place; and that the said Samuel Norwood, be further enjoined not to disturb, molest, or interrupt the said Edward Norwood in the enjoyment of one-half of the profits of

say they did not act as the agents, or with the consent or knowledge of *Gilbert Murdock*; that they together drove some sheep to

such ferry, or in carrying on a ferry at the said place, in case the said Edward shall think proper to provide for carrying on the same, on the said Samuel's refusing or neglecting to carry the same on jointly with the said Edward, or singly, allowing the said Edward one-half of the profits; and that the said Samuel be further enjoined not to change, or stop up, or obstruct the passage of any road, on either side of the river leading to the said ferry, without the consent of the said Edward; but that all access, as heretofore, shall be allowed by the said Samuel, to every person, carriage, horse or other animal, or thing coming to the said ferry, or which would come to it, in case there was no obstruction. And in case the said Samuel shall refuse, neglect, or delay to carry on a ferry jointly with the said Edward, at the place where the ferry aforesaid, first mentioned in the bill, was carried on, and the said Edward shall think proper to carry on the same for their joint benefit, he, the said Samuel, is hereby enjoined not to carry on without the said Edward's consent, any ferry which shall interfere with, or take custom from the ferry carried on at the said place. And in case the said Edward, on the said Samuel's refusal, neglecting or delaying as aforesaid, shall actually set up and carry on a ferry at the place aforesaid, he shall pay weekly to the said Samuel, one-half of the profits thereof, after deducting the expense incurred in so setting up and carrying on. And it is further *Decreed*, that the defendant pay unto the complainant, the costs by him expended, in the prosecution of his suit, amounting as taxed by the register, to the quantity of 18,220 pounds of tobacco.

On the fullest consideration of all the circumstances of this case, and of the principles established in this court, the Chancellor has, at length, passed a decree, which, independent of the consent of the parties, and of another tribunal, must be final. After much anxious thought he has satisfied his own judgment and conscience. His feelings will be much gratified if the parties shall be satisfied, that he has done neither more nor less than his duty required; but it appeared to him possible, without their consent, to place them precisely in the situation contemplated by their agreement. It has hitherto been his practice to consult, as far as possible, consistently with justice, the welfare of every person who has come before him; and therefore he has not unfrequently proposed to settle a controversy, and to save much further vexation and expense by a decree or consent. Whatever may be the prospect of success, he cannot forbear suggesting to the present parties an accommodation on such terms, as he conceives an enlightened arbitrator who should be equally a friend to justice, and to each of them, would prescribe. It is evident, that without a good understanding between them, the ferry cannot advantageously be carried on; and it must remain a constant subject of contention, supposing even that the foregoing decree is to stand. But in their causes there is a variety of difficult points; what will be the decision of the Court of Appeals is uncertain; and if, in the course of their lives, an end can be put to their controversies, neither can possibly so far succeed as to have been a gainer by it. He is certain then, that neither can be a loser by acceding to his proposal. Actuated by the principles of humanity, and partial to neither, he flatters himself, that neither can reasonably be offended by a proposition, which, he conceives, will appear reasonable to the friends of both, and to every unprejudiced, disinterested person. On the evidence in the cause, together with the information he has otherwise received, he proposes, that they sign and file in this court an agreement, to the following effect.

First, that the foregoing decree be set aside by another decree; *second*, that the new decree direct Samuel Norwood, on the first day of November next, to pay

graze in a field belonging to *Gilbert Murdock*, with his permission, and finding a few panels of the fence down, at the place spoken

or bring into this court, to be paid to Edward Norwood, the sum of £500; *third*, that each party release to the other all right to that part of *United Friendship* in his possession under their agreement; *fourth*, that Edward convey, transfer, and release, to Samuel, all right to the ferry in the bill mentioned, or to the profits thereof; *fifth*, that Samuel, on the first day of November, 1801, 1802, 1803, and 1804, pay or bring in as aforesaid, the sum of £375; that is to say, Samuel shall bring in, or pay the sum of £1,500, without interest, by four equal annual instalments; *sixth*, that on Samuel's failure, at any of the periods, to pay or bring in, he shall be liable to the usual execution or process, to compel him; *seventh*, that each party bear his own costs, those of recording to be equally divided.

Supposing the ferry to produce monthly £80, the annual amount is £960. But it is probable that the receipts will not be so great throughout the year as they have lately been. Suppose then an average of £70, that is, £50 each, for six months, and £60 each, for the other six months. We have then £840 for the amount of the year. From this £840 may be deducted for all expenses and contingencies, at least £140, which reduces the profits to £700, one-half of which is £350. To suppose this profit to continue, we must suppose that no other ferry to the federal city is to be erected—that the rates of ferriage are to continue, &c. &c. &c. In short, I should imagine a man entitled in *perpetuum*, to one-half of the ferry, carried on as it ought to be, and having no dispute whatever about his right, would make a good bargain in selling it for £2,000. But the right is not clearly established, Samuel Norwood claims the ferry landing as his own right; contends, that Edward Norwood has no right whatever, and that the agreement respecting the ferry was only for carrying it on in partnership for a very short term, or whilst the apparatus should last. In short, it is extremely doubtful, whether the Chancellor's decree will stand; and even, whether in the end Edward Norwood will have any right in the ferry, or if he should have such right, whether, under all circumstances, it may be profitable. Would it not then be prudent in Edward Norwood to accept the offer of about £1,250 for his share of the ferry, to be paid at four annual instalments? At what expense is his suit to be conducted! With what trouble and vexation is it to be carried on! How uncertain is the issue! and ruinous must the loss of his cause prove! Arguments for Samuel Norwood's acceptance of the proposed accommodation are equally powerful, supposing the Chancellor's decree to stand.

From this decree the defendant appealed, and gave his bond in the penalty of £2,000, with two sureties. A solicitor certified thus, 'the above sureties are sufficient.' Upon which the Chancellor endorsed the bond thus, 'sureties approved, 14th June, 1800.'

November term, 1802.—BY THE COURT OF APPEALS.—*Jones, Mackall, Potts, and Dennis.*—*Decreed*, that such part of the decree complained of, for ratifying and confirming the last stated account and report of the auditor, whereby the defendant was adjudged, and decreed to pay to the complainant the sum of £776 15s. 6d. with interest from the 31st of January, 1800, until the time of payment, be reversed. *Decreed*, also, that the complainant account with the defendant for the sum of £537 12s. 7d. being the amount of the one-half of the improvements erected on the said tract of land called *United Friendship*, at the time of the division thereof between the said parties, and that the defendant account with the complainant for the sum of £400, being the amount of the difference of soil, between the respective parts of the

of, they put them up to keep the sheep in the field. They disclaimed all right and title whatever to the field or place where they put up the fence, and aver that they acted in total ignorance of what they did having been in any way prohibited by an injunction of this court.

24th May, 1830.—BLAND, *Chancellor*.—To obtain an attachment for a violation of an injunction, the party grieved must, by petition, state particularly the nature and extent of the breaches of the injunction of which he complains, and the person by whom they have been committed; and his petition must be supported by his own oath, or by the affidavits of others. Upon which, an attachment may be ordered, returnable forthwith, or on a particular day according to the nature and exigency of the case. The breaches so set forth in the petition and annexed affidavits, are the charges which the party brought before the court, is expected to answer upon oath. The charges thus set forth by the party complaining, standing in the place of special interrogatories, none need be propounded to the accused. If the party attached makes a full and frank answer to all the facts, and positively denies or justifies all that is alleged against him, he must be at once discharged, as having entirely acquitted himself of the contempt imputed to him. I know of no instance in this court in which

said tract of land, and that the said two sums of £537 12s. 7d. and £400, bear interest from the 12th November, 1785. And that the auditor, in re-stating the said account, shall also charge the defendant with a moiety of the profits of the said ferry, agreeably to his said last stated account and report, with interest thereon, to be computed from the periods stated in the said account. And that the auditor, in stating such account, and ascertaining the profits of the new ferry set up by the defendant, shall ascertain the reasonable expense of setting up and establishing the same, as well as afterwards keeping the ferry, and shall charge the complainant with one-half part of the said expenses. *Decreed*, also, that all and every part of the said decree respecting the agreement stated in the said bill for dividing the land called *United Friendship* between the parties, and carrying the same into full effect; and all and every part of the said decree respecting the ferry; and the complainant being entitled to hold one-half part of the same, and to have and receive one moiety of the net profits thereof, as tenant in common with the defendant, conformably to the limitations and conditions contained in the said decree, be affirmed. *Decreed*, also, that the Chancellor pass such decree and order as shall be necessary to have the account stated in the manner herein directed; and on return thereof, that he pass a decree for the payment of principal and interest due the complainant; and that in the meantime he pass such further order and decree as may be necessary for carrying into effect those parts of the said decree, affirmed by this court. *Decreed*, also, that the decree of the Chancellor respecting the payment of costs by the defendant, be reversed, and that each party pay his own costs in the court of Chancery, and in this court.—4 H. & J. 115.

proofs and affidavits have been allowed to be introduced in opposition to the answer of the accused. If, on the other hand, the accused does not, by his answer, fully deny or justify the acts charged against him, he may be fined and imprisoned, or such terms imposed upon him as the justice of the case may require. (*k*)

In this instance *Gilbert Murdock* has, in the most complete and positive manner, denied all the charges made against himself, and the other two persons, who stand accused, sustain his answer by their assertion that they did not act as his agents, or with his knowledge. This is an injunction intended to do the office of a writ of *estripment*; as to which it is laid down, that if a stranger, of his own wrong, do waste, after the prohibition delivered unto the tenant, and against the tenant's will, then the tenant shall not be punished for that waste. (*l*) Hence, it is clear, that this tenant, *Gilbert Murdock*, must be discharged with his costs.

But *William Murdock* and *Johnson* admit that they did the act complained of, and that they have no claim whatever to the place where they erected the fence. They must, then, by their own admission, be considered as trespassers, who undertook, at their peril, to meddle with property to which they had no manner of title; and as such they may justly be held responsible, in every way, for all the consequences of their unauthorized act.

It is, in general, true, that this process of attachment for contempt, in violating an injunction, can be directed against no one but a defendant to the injunction bill, or one who acts as an agent, or by some concert with a defendant; and it is also certain, that this court can have no concern with any action at common law, which may be brought against these trespassers. But that very act which these persons have done, this court, by its injunction, prohibited the defendant himself, as a claimant of the property, from doing, until the right should be determined between him and this plaintiff. It is evident, therefore, that these trespassers have altered that state of things which this court had determined should remain unchanged; they have benefitted the defendant by doing that which he himself was not allowed to do; they have injured the plaintiff in doing that which he had complained of as a wrong; and they have, without a shadow of right, impertinently intermeddled with a matter which is the subject of a controversy de-

(*k*) *Childrens v. Saxby*, 1 Vern. 207; *Angerstein v. Hunt*, 6 Ves. 488.—(*l*) F. N. B. 141.

pending in this court. Had they acted under a claim of title other than that of the defendant, their conduct, so far as regards this proceeding, must have been considered as entirely justified. Their ignorance of the act committed by them having been prohibited by an injunction of this court, and of its having any injurious bearing upon the matter in litigation in this suit, may be heard in mitigation of the wrong; but it cannot be deemed a justification of their conduct. A pragmatic trespasser subjects himself to all the consequences of his acts, as well in an action at common law, as on an attachment in this court. (m) I cannot make the defendant *Gilbert Murdock* pay the costs and take down the fence, because he is entirely innocent; and it would be highly unjust to throw the costs and the trouble of doing so upon the plaintiff *William Brewer*, because he is the party grieved. I shall, therefore, cast the whole upon these two trespassers.

Whereupon, it is *Ordered*, that *Gilbert Murdock* be and he is hereby discharged with his costs. And it is further *Ordered*, that the said *William Murdock* and *Zachariah Johnson* be, and they are hereby commanded and required, without delay, to take down and remove the fence erected by them, as stated in the proceedings, and to pay all the costs of this proceeding, to be taxed by the register, and to stand committed until the said costs are fully paid.

CORRIE'S CASE.

The jurisdiction of the Chancellor as to infants and lunatics.—In all cases where the jurisdiction of the ordinary tribunals falls short, the Chancellor may, on petition without suit, appoint a guardian to an infant; and provide for his education and maintenance, and the management of his estate.—But under a *habeas corpus*, the judicial authority extends no further than to the discharge of a citizen from illegal restraint.—The several kinds of personal incapacity to contract.—The state is bound to take care of all its own citizens; particularly infants, lunatics and paupers.—Every one is permitted to remove his property out of the state at pleasure.—The property of a debtor or deceased person, may be detained in the country where it is found, for the benefit of his creditors there residing, or of the state, in opposition to any foreign administration or bankrupt, or insolvent laws.—Land is governed by the law of the country in which it is situated.—The succession to personal property, on intestacy, is regulated by the law of the deceased owner's last domicile.—The contract of marriage, if valid where made, is, with few exceptions, valid every where; but the right to personal property, as a consequence thereof, is regulated by the domicile of husband and wife.—The appointment by

the Chancellor of a guardian, to a citizen infant, resident here, should be recognized every where, so as to enable such guardian to collect and bring his ward's property within the jurisdiction of this state.

James Corrie, by his petition, stated that his brother *John Corrie*, late of the Island of Trinidad, had died there, leaving a considerable real and personal estate, which, by his last will, he had given to the children of his six brothers and sisters; that the petitioner had eight infant children, who were consequently entitled to one-sixth part of the estate so devised and bequeathed; and that by the laws of Trinidad, the estate so given to his infant children, could only be recovered by their guardian. Whereupon he prayed, that he might be appointed their guardian for that purpose.

31st May, 1830.—*BLAND, Chancellor*.—It is clear, that in all ordinary cases, arising wholly within the jurisdiction of Maryland, this court, when it may be proper for it to act at all, may make an appointment of a guardian to an infant upon petition only, without any bill filed or suit in court; (a) and therefore, if this be a case in which it may act with propriety, there can be no doubt,

(a) *Eyre v. Shaftsbury*, 2 P. Will. 118, 120; *Ex parte Birchell*, 3 Atk. 813; *Ex parte Salter*, 2 Dick. 769, S. C.; 3 Bro. C. C. 500; *Ex parte Wheeler*, 16 Ves. 266. In the matter of *Woolscombe*, 1 Mad. Rep. 213; *O'Keeffe v. Casey*, 1 Scho. and Lefr. 106; *Villareal v. Mellish*, 2 Swan. 536, note; *Pratt v. Pratt*, ante 429.

Ex parte Ross.—*Oliver Bond Ross*, by his father and next friend, *James Ross*, filed his petition here, in which he stated, that his father had purchased for him ten shares of stock in the Union Bank of Maryland, for the paying of the instalments, drawing the dividends, &c. on which, it was necessary he should have a guardian appointed; and therefore prayed, that his father might be appointed his guardian, &c.

16th April, 1805.—*HANSON, Chancellor*.—The Chancellor has considered the petition of *Oliver Bond Ross*, and is by no means satisfied that it is necessary, or that it will be deemed proper for him to exercise the power of appointing a guardian in the present case. From the 101st act of 1798, ch. 12, it clearly appears, the idea of the legislature, that a father is by nature, entitled to act as guardian of the property as well as the person of his child, unless, &c. &c. The Chancellor makes these remarks, in order that his decision may not be considered hereafter, as a precedent, respecting the right, or power of a natural guardian. And as it is impossible, that his appointment, concurring with the order or institution of nature, can be injurious; it is *Decreed*, that *James Ross*, of Baltimore, father of the petitioner, be, and he is hereby constituted guardian of the said *Oliver Bond Ross*, for the purpose only, of superintending and managing the shares and interest of the said *Oliver B. Ross*, in the Union Bank of Maryland; and of paying the said bank or receiving from it, money for the said *Oliver*; and of acting in the premises, to all intents and purposes, as the said *Oliver*, if of full age, might act for himself. And it is hereby declared the intent of this decree, to give to the said *James Ross*, authority to act as guardian in no other respect whatever.

that it may, upon this petition alone, make such an appointment as is called for, without a suit. But it would be idle to act at all, if it should clearly appear, that the action of the Chancellor could be of no avail; and therefore, it will be proper to consider the nature of the Chancellor's authority in relation to the guardianship of infants; and the principles of international courtesy upon which an appointment of a guardian to an infant made in one nation, may be recognized in all others.

This petition asks for the appointment of a guardian to eight infants, of different ages and sexes; and consequently, it may be well, before we proceed with the principal matter, to make some observations as to the nature of that incapacity, for which it is here proposed to provide by the appointment of a guardian.

There are two kinds of personal incapacity; the one natural, the other artificial; or *first*, that which arises from bodily or mental defect; and *secondly*, that which is declared by positive law. Of the first kind, is that of lunacy. A lunatic is every where held to be incompetent to contract in any way whatever, by reason of his mental defect; (*b*) and because of incurable impotence, arising from injury, or malconformation, a person is every where held to be incompetent to contract marriage; which requires a bodily as well as a mental ability so to contract. (*c*) Of the second kind of personal incapacity, is that of a married woman; whose incapacity, (regarding the mere bond by which the parties are bound together as husband and wife, as that alone which is recognized by the law

Some doubts having arisen, and objections having been made as to the extent of the authority of the guardian under this order, the matter was again brought before the court.

26th June, 1805.—HANSON, Chancellor.—The Chancellor having heretofore passed an order, authorizing James Ross, the father of Oliver Bond Ross, to superintend and manage certain shares and interest of the said Oliver B. Ross, in the Union Bank of Maryland, and of paying the said bank, or receiving from it money for the said Oliver B. Ross; and of acting in the premises, to all intents and purposes, as the said Oliver, if of full age, might act for himself; and doubts being, as is stated, entertained as to the extent of the authority of the said James Ross; it is hereby adjudged and *Ordered*, that the said James Ross be, and he is hereby authorized to sell and transfer the said shares, or any of them, in the same manner, as if the said shares belonged to himself; and in all respects, relative to the said shares and interest, to act for the said Oliver Bond Ross, as the said Oliver, if of full age, might act for himself. (Such guardians now required to give security, &c. 1816, ch. 203, s. 1.)

(*b*) *Ex parte* Lewis, 1 Ves. 298; *Ex parte* Annandale, Amb. 80; *Ex parte* Gilham, 2 Ves. jun., 587.—(*c*) Sabell's case, Dyer, 179; Bury's case, 5 Co., 99; Guest v. Shipley, 4 Eccles. Rep. 548.

of nations as being every where alike obligatory,) is in each state of positive institution; and varies in form and degree with the various nations by whose laws it is regulated; or within which country, she, with her husband, may, for the time being, have their domicil. (d) The incapacity of an infant, is, in some respects, both natural and artificial. For some time after birth, the incapacity of an infant, both bodily and mental, being natural and alike in all countries, must accordingly be every where so considered. Yet after that period of mere infantine imbecility, there is a space of non-age established by law, which is different in different countries.

But as the exact point of full age has been every where regulated, chiefly with a view to the disposition of property, what is to be deemed full age, must therefore be determined, in each state, according to that right of disposition. Claims to land and immoveable property are always regulated by the law of the place where it is situated; and hence, although these female infants would here, on their attaining the age of *eighteen*, have a right to dispose by will, of their real estate here; (e) yet, they may not be allowed to make any such disposition of their land in Trinidad, until they attain the age of twenty-one years. And as the disposition of personal property is, with some qualifications, allowed by all nations to be governed by the law of the owner's domicil, it follows, that full age, as established by that law, must give a capacity to dispose of such property, wherever it may be found. Except however, that every person, whether temporarily or permanently living in a country, must, as to all his personal capacities, during his residence there, be governed by the law of the place; as, in general the personal capacity is regulated by the law of the country. (f) And consequently, in the case under consideration, no great difficulty can arise in fixing the exact termination of the infancy of these children, or the duration of the guardianship, that may be here assumed over them.

Among the important duties which a state owes to itself, is wrapped up, that obligation by which it is bound to take care of all

(d) *Feaubert v. Trust*, Prec. Cha. 207; *Doe v. Vardill*, 11 Com. Law Rep. 266.—(e) 1798, ch. 101, sub ch. 1, s. 3.—(f) *Ex parte Gillam*, 2 Ves. jun., 587. In the matter of *Houston*, 1 Russ. 312; *Male v. Roberts*, 3 Esp. N. P. Rep. 163; *Dalrymple v. Dalrymple*, 4 Ecclesi. Rep. 485; *Herbert v. Herbert*, 4 Ecclesi. Rep. 535; *Ruding v. Smith*, 4 Ecclesi. Rep. 551; *Harford v. Morris*, 4 Ecclesi. Rep. 575; *Middleton v. Janverin*, 4 Ecclesi. Rep. 582; *Doe v. Vardell*, 11 Com. Law Rep. 266.

its own citizens. Upon which obligation each member of the community, as a component part of the whole, has a clear and undeniable claim upon the state for its assistance, in all cases, where, either because of the over-ruling circumstances in which he may be placed, or because of his own peculiar imbecility, he is incapable of sustaining himself. Hence it is, that, according to all law, a state is bound to take care of and protect its own infants, lunatics, and paupers. (g) And such has always been the practice, and the admitted obligation and law of Maryland.

In England, many doubts and much contrariety of opinion have been expressed as to the sources from which the Chancellor derives the power he exercises in cases of infancy and lunacy. It is admitted, on all hands, that the state is under an obligation to put forth its power for the protection of such persons in some way, the only difference of opinion there, being as to the extent to which that power, looking to the manner in which it has been delegated to the Chancellor, shall be exercised by him for the benefit of those who may be found in that imbecile condition. (h) The Chancellor, or any court of common law may, by means of a *habeas corpus*, relieve an infant or lunatic as well as an adult of sound mind from any illegal restraint, or set him free, without making any provision whatever for him, under that form of proceeding. But the general care which he has a right to claim, as a due from the state, can only be obtained from the Chancellor upon the ground of that parental authority with which he has been clothed as the representative of the state for the benefit of all such persons. (i)

Here it has always been admitted, apparently without any reference to the sources from which the Chancellor of England had derived his authority, that the Chancellor of Maryland was invested with all the powers in relation to infants and lunatics, with which the Chancellor of England had been clothed; as founded on an obvious necessity, that the law should place somewhere the care of individuals who could not take care of themselves, particularly in cases where it was clear, that some care should be thrown around them. And consequently, the broad principle may be safely as-

(g) *Eyrie v. Shaftsbury*, 2 P. Will. 118, 123; Vattel, b. 1, ch. 2; Montesq. Sp. Law, b. 23, ch. 29.—(h) Co. Litt. 89, a. note 16; 2 Fonb. 226; 1 Blac. Com. 302, 304, 460; *De Manneville v. De Manneville*, 10 Ves. 63.—(i) *De Manneville v. De Manneville*, 10 Ves. 58; *Lyons v. Blenkin*, 4 Cond. Cha. Rep. 115, and notes; *The King v. Hopkins*, 7 East. 579; *The Case of the Hottentot Venus*, 13 East. 195; *Ex parte Skinner*, 17 Com. Law Rep. 122.

sumed here, that the Chancellor is that judicial officer by whom the state discharges its duties in the care of its infants and lunatics in all cases where the care of them has not been otherwise specially and expressly provided for; (*j*) as by the jurisdiction conferred on the Orphans Courts; (*k*) or upon the trustees of the poor; (*l*) or by the establishment of alms houses, (*m*) hospitals, (*n*) and the like.

Upon the same general and fundamental principles of a duty to itself, the state is bound to protect the property as well as the persons of all who abide, or suffer their property to remain within its domain. An alien friend may purchase and hold chattels, real, and all kinds of personal property; and may freely transfer to any place, beyond the jurisdiction of the state, his moveables, subject however in general to such export duty as the state may think proper to impose; and also subject, in cases of public expediency, or on his becoming an alien enemy, to a total prohibition of removing any of his property out of the state, so as thereby to weaken it and strengthen its antagonist. This permission of removal of personal property is, however, granted with a view to the encouragement of commerce and the aggrandizement of the state; and therefore, the exceptions to the rule, as well as the rule itself, are derived from the same source; that of a duty which the state owes to itself, as a whole; and as one which it owes to each of its citizens in the protection of his interests by the general operation of its laws. The free exportation of moveables, which, in almost all nations, has been treated as a kind of general licence, which may be withheld altogether, or subjected to the control of a heavy tax, may, in the United States, in time of peace, be considered as an almost unqualified right, since the federal constitution has declared, that no tax or duty shall be laid on articles exported from any state. (*o*) But this constitutional restriction relates to commercial regulations only, and to taxes which might have been so imposed for the purpose of raising revenue for the benefit of the whole state. It cannot affect the right to detain and prevent the exportation of any such property for the special benefit of any citizen of the state, and as a means of enabling him to obtain satisfaction of a debt

(*j*) *Wellesley v. Beaufort*, 3 Cond. Cha. Rep. 10; *Ex parte Francis Lee*, a lunatic, 7 June, 1718; Chancery Proceedings, lib. P. L. fol. 469.—(*k*) 1798, ch. 101, sub ch. 12; Bac. Abr. tit. Customs of London, B.—(*l*) 1793, ch. 45; Lunatic Petitions, 2 Atk. 52; 1 Collin. Idiots, 604.—(*m*) 1768, ch. 29, &c.—(*n*) 1797, ch. 102, &c.—(*o*) Const. U. S. art. 1, s. 9, cl. 5.

due to him from its owner. And therefore, even although the exportation of such property may be regarded here as an absolute right, yet the authority of a citizen creditor to seize it by a judicial proceeding, and have its exportation totally prevented by a sale for the satisfaction of his claim, is no more than the exercise of an authority for his benefit which the state owes him as a duty. Hence it is, that by our attachment act and practice, and by some similar judicial proceeding in all other countries, a citizen creditor may obtain satisfaction of his claim from the property of his foreign or absent debtor found within the jurisdiction of the state. (*p*)

The state would, however, fall short in this its duty, if it failed to provide some means of securing satisfaction to its own citizens as well from the property found here of their foreign insolvent or deceased debtors, as from their foreign and solvent living debtors. That provision of the federal constitution, which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states; (*q*) looks to other privileges, such as the right to acquire and hold property, to take by descent, and the like, and does not at all affect the duty which, in this respect, each of the several states of our Union owes to its own citizens; (*r*) or that course of distribution consequent upon intestacy, which, by the general comity prevailing among nations, is regulated according to the testator's domicile. (*s*) The law of nations, so far as it applies to the regulations of commerce, is, as in all other respects, founded on principles of perfect reciprocity and equality; and, therefore, it cannot be applied to cases which do not admit of reciprocation and equality. In England, and in some other countries, there are bankrupt laws; in this there are none. Under the insolvent laws of some of the states of our Union, the person of the debtor may be released from confinement, leaving all his then held, or thereafter acquired property liable; but, under our law, a debtor may be so absolutely discharged as to protect his future acquisitions of property as well as his person. And, besides, bankrupt and insolvent laws are not so much regulations of com-

(*p*) 1715, ch. 40; 1795, ch. 56; 1825, ch. 114; *Burk v. McClain*, 1 H. & McH. 236; *Shivers v. Wilson*, 5 H. & J. 130; *Barney v. Patterson*, 6 H. & J. 182; *Willes v. Pearce*, 6 H. & J. 191, note; *Mandeville v. Jarrett*, 6 H. & J. 497; *Taylor v. Phelps*, 1 H. & G. 493; *Manro v. Almeida*, 10 Wheat. 473; *Douglas v. Forrest*, 15 Com. Law Rep. 120; *Chase v. Manhardt*, 1 Bland, 344.—(*q*) Art. 4, s. 2, cl. 1.—(*r*) *Campbell v. Morris*, 3 H. & McH. 535; *Ward v. Morris*, 4 H. & McH. 340.—(*s*) *Thorne v. Watkins*, 2 Ves. 36; 5 Ann. ch. 8, art. 4.

merce, as they are mere municipal rules of law for winding up and adjusting cases of interrupted and broken commerce; they are forced upon debtors, without any alternative, as the only means of escaping imprisonment, and are highly penal in many of their provisions; they cannot, therefore, be considered as in all respects voluntary, and must be, from their very nature, entirely local in their operation.

Hence, it has always been held here, that the bankrupt and insolvent laws of the other states of our Union, as well as of other countries, could not be allowed to operate, in any way whatever, upon the property of the debtor found here, and particularly in contravention of any rule in relation to immoveable property lying within this state, or to the prejudice of any citizen of this state; as they clearly would, if they were allowed to vest any right in the assignees or trustees of such bankrupt or insolvent debtors, or were permitted to give an exclusive right to have such property removed any where beyond the jurisdiction of the state, there to be distributed among all his creditors, including those resident here, which would be, in effect, to restrain our own citizen creditors from touching their absent insolvent debtor's property found here, upon which he had been credited, and to direct them to follow it into a distant and foreign country, there to seek satisfaction according to laws with which, it could not be presumed, they were at all acquainted. (*t*)

Therefore, in discharge of this duty to its own citizens, Maryland, by one of its earliest legislative enactments, not now in force, declared, that where the goods of a debtor sued were not sufficient to pay all his debts within the province, they should be sold at an outcry, and distributed equally among all the creditors *inhabiting within the province*, except that the mere and proper debts of the Lord Proprietary should be first satisfied, and then fees and duties to public officers, and charges; and that debts due for wine and hot-waters be not satisfied till all other debts were paid, (*u*) and by other and still existing acts of assembly, it has provided, that all citizen or country creditors, as they were called, should have made or secured to them a full satisfaction of their claims out of their foreign bankrupt or insolvent debtor's property found here, before it should be removed beyond the jurisdiction of the state. (*w*)

(*t*) *Holmes v. Remsen*, 20 John. Rep. 229.—(*u*) 1633, ch. 2, s. 11; 2 Boz. His. Mary. 147.—(*w*) 1704, ch. 29; 1753, ch. 36; 1786, ch. 49, s. 3; *Burk v. McClain*, 1 H. & McH. 236; *Ward v. Morris*, 4 H. & McH. 337.

These, and similar legislative enactments passed by the other colonies, now states of our Union, were, before the revolution, much complained of by the mother country, as bearing hardly and unjustly upon the interests of creditors resident in Great Britain. (x) Indeed, England having a greatly extended commerce, and her merchants and manufacturers crediting abroad vastly more than they owe to foreign creditors, has a strong and peculiar interest in contending for a rule which draws to herself the distribution of all the effects which her lucrative commerce has dispersed over the globe; (y) and hence, it has long since become the settled policy of the English judiciary, to extend the operation of their bankrupt laws, so as to grasp and gather under their administration, for the benefit of English creditors, the effects of those who may be declared bankrupt under their laws, from all parts of the world, regardless of the pernicious bearing of such a proceeding upon the interests of the foreign creditors of such bankrupt or insolvent debtors; upon the ground, that personal property must be governed by the law of the owner's domicile. (z) And yet it is held by them, that the discharge of a debtor, under the bankrupt or insolvent laws of one country, cannot impair the obligation of contracts made in another, or discharge such debtor from any liability to the claims of his foreign creditors contracted any where else. (a)

But the weight of American judicial authority, is adverse to such an unfair course of proceeding, and accords in principle with the before mentioned legislative enactments of Maryland, by which the interests of the state's own citizens are to be first and specially regarded; and for that purpose, our law refuses to allow the

(x) *Ex parte* Blakes, 1 Cox, 398; *Hunter v. Potts*, 4 T. R. 187; Chalmer's Political Annals, 689, 693; 1 Chal. Opin. Em. Lawyers, 29. In an opinion of the attorney and solicitor-general, D. Ryder and W. Murray, given on the 3d of June, 1747, to the commissioners of trade and plantations, respecting an act which had been passed in the year 1715, by the general assembly of North Carolina, for giving priority to country debts, they say, 'that such part of the act as postpones the execution on judgments for foreign debts, in the manner therein provided, is contrary to reason, inconsistent with the laws, and greatly prejudicial to the interests of this kingdom; and therefore, unwarranted by the charter; and consequently, void. And we are of opinion, that his majesty may declare the same to be so, and his royal disallowance thereof.' 2 Chal. Opin. Em. Lawyers, 62.—(y) *Holmes v. Remsen*, 20 John. Rep. 264.—(z) *Sill v. Worswick*, 1 H. Black. 665; *Philips v. Hunter*, 2 H. Blac. 402; *Hunter v. Potts*, 4 T. R. 183.—(a) *Smith v. Buchanan*, 1 East. 6; *Lewis v. Owen*, 6 Com. Law Rep. 555; *Phillips v. Allen*, 15 Com. Law Rep. 269; *M'Kim v. Marshall*, 1 H. & J. 101; *Frey v. Kirk*, 4 G. & J. 510.

proceedings under the bankrupt or insolvent laws of a foreign state, to give any right, or to affect the title to any property belonging to the debtor, and found within this state, in any way whatever. (b)

The law in relation to the administration of a deceased foreign debtor's effects found here, is now settled upon the same general principles, that of a duty which the state owes to its own citizens.

According to the ancient common law of England, upon the death of any one intestate his personal estate devolved upon the king, whose duty it was, as sovereign, and as *parens patriæ*, to take care of, and have justice done to all his subjects; and therefore, he caused the effects of the deceased to be placed in the hands of some fit person, to be administered for the benefit of his creditors and next of kin. After which, this public duty of the sovereign was delegated by him to the clergy; who under the pretext of applying such estates to pious uses, upon the ground, that there was a general principle of piety in the testator, (c) fraudulently appropriated the whole to their own aggrandizement, leaving the creditors of the deceased unpaid, and his next of kin destitute. To prevent these fraudulent practices of the clergy of those times, the parliament interposed and passed laws, in affirmance of the ancient common law, requiring the bishops to appoint administrators, in whose hands the personal estate of intestates, should be placed, to be administered for the benefit of his creditors and next of kin. (d) But the bishops who had been so long in the habit of appropriating all the goods of intestates, found within their respective districts, to their own uses, were permitted to retain the right of granting administration of all such effects; and, therefore, to secure to themselves their fees and perquisites for so doing, they refused to admit the validity of an administration granted any where beyond their own peculiar jurisdiction. (e) And following out the same rule, the courts of law and equity of England, held that they could not take notice of any letters of administration granted in a foreign country, without intimating, that they refused

(b) *Holmes v. Remsen*, 20 John. Rep. 229; *Milne v. Moreton*, 6 Binney, 353; *Burk v. McClain*, 1 H. & McH. 236; *Wallace v. Patterson*, 2 H. & McH. 463; *Harrison v. Sterry*, 5 Cran. 289; *Ogden v. Saunders*, 12 Wheat. 213; *Brickwood v. Miller*, 3 Meriv. 280; *Kames' Pri. Eq. b. 3, c. 8, s. 6.*—(c) *Moggridge v. Thackwell*, 7 Ves. 69.—(d) *Hensloe's case*, 9 Co. 37; *Carter v. Crawley*, T. Raym. 496; *Marriot v. Marriot*, Gilb. Eq. Rep. 203; *Manning v. Napp*, 1 Salk. 37; 2 Inst. 397; 2 Blac. Com. 494; 13 Ed. 1 c. 19; *Kilty Rep.* 144.—(e)—*Middleton v. Crofts*, 2 Atk. 659; *Roberson Succession*, 250, 251.

to do so, in order to hold the property of the intestate within reach, as a means of satisfying his English creditors and next of kin; or if there were no creditors, or next of kin, as a means of securing it for the benefit of the state to whom, in such case, it properly belonged. (*f*)

But latterly, in England as well as in this country, a more enlarged and just view has been taken of this matter; and it has been held, that as the state must have a right to regulate that which it protects, and is bound in duty to see its own citizens satisfied before it suffers the property of their debtor to be withdrawn from its jurisdiction, no foreign administration shall be recognized here. And that the administration of all deceased persons' estates must be taken out here by a citizen of the United States, (*g*) in order that there may be some person here responsible to our own citizen creditors, legatees, and distributees of the deceased, to the full value of his effects found here; and also, that after the debts have been paid, if there be no next of kin, that the surplus be paid to the state, or to the public schools here, to whom, in such cases, it properly belongs; or according to the law of the deceased's last domicil. (*h*)

It having been universally admitted, not indeed as a binding rule of international law, but as a matter of general comity among civilized nations, that personal property follows the domicil of its owner; and that the succession to it must be regulated, on his death intestate, by the law of that domicil; and as the administration of such property looks, in the first place, to the payment of all the debts of the deceased, and then to a distribution among those entitled to succeed to it, according to the law of the deceased's domicil, it most commonly happens, that none but an administration under that law can, with facility, if at all, embrace both those objects. Consequently, the administration of the deceased's domicil is, every where, regarded as *the administration in*

(*f*) *Daniel v. Luker*, Dyer, 305; *Jauncey v. Sealey*, 1 Vern. 397; *Tourton v. Flower*, 3 P. Will. 370; *Atkins v. Smith*, 2 Atk. 63; *Thorne v. Watkins*, 2 Ves. 36.—(*g*) 1798, ch. 101, sub ch. 4 and 5.—(*h*) *Bempde v. Johnstone*, 3 Ves. 198; *Somerville v. Lord Somerville*, 5 Ves. 750; *In the Goods of Beggia*, 2 Eccle. Rep. 126; *Holmes v. Remsen*, 20 John. Rep. 265; *Græme v. Harris*, 1 Dall. 456; *McCullough v. Young*, 1 Bin. 63; *Desesbats v. Berquier*, 1 Bin. 336, 349, note; *Anonymous*, 1 Hayw. 355; *Admr. of Butts v. Price*, 1 Cam. & Norw. 68; *Harrison v. Sterry*, 5 Cran. 289; *Smith v. The Union Bank of Georgetown*; 5 Peters, 518; *Glenn v. Smith*, 2 G. & J. 493; *Charlotte Hall School v. Greenwell*, 4 G. & J. 408; *Thomas v. Visitors of Frederick County School*, 7 G. & J. 370.

chief, while those granted in other countries of the effects of the deceased found there, are considered as merely *auxiliary* to such administration in chief. So that, for the benefit of creditors, and the public, the law of the state where the personal property is found gives the rule; although as regards a distribution among the next of kin of the deceased, the law of his domicil is allowed to govern. (*i*)

This reference to the last actual domicil of the deceased for the rules by which his personal estate is to be disposed of, is, however, most commonly made in cases of absolute intestacy; and so too in cases where the deceased may have made a will disposing of his moveables, it is always presumed to refer to the law of his then domicil; and upon that presumption, without any thing appearing to the contrary, it is deemed valid, or otherwise according to that law, and in pursuance thereof is executed, or set aside; recollecting, however, that no testamentary act or disposition can be allowed to contravene any known rule of our own law. (*j*)

But it must be always borne in mind, that according to all law, real estate, immovables, or territorial property, considered as a part of the habitation of the nation is, in all cases, governed entirely, and in all respects, by the law of the state under whose jurisdiction it is situated. (*k*) And moreover, that marriage, being a contract recognized by the law of nations, is, with few exceptions, valid every where if binding where it was made. (*l*) And consequently, that all the property of the wife vests in the husband, or becomes subject to his control during, and in consequence of the

(*i*) *Pipon v. Pipon*, Amb. 26; *Thorne v. Watkins*, 2 Ves. 36; *Somerville v. Lord Somerville*, 5 Ves. 750; *Pottinger v. Wightman*, 3 Meriv. 68; *Lowe v. Farlie*, 2 Mad. Rep. 101; *Munroe v. Douglas*, 5 Mad. 380; *Logan v. Fairlie*, 1 Cond. Cha. Rep. 459; *The Harmony*, 2 Rob. Adm. Rep. 322; *La Virginie*, 5 Rob. Adm. Rep. 98; *Smith v. The Union Bank of Georgetown*, 5 Peters, 518; *De Sobry v. De Laistre*, 2 H. & J. 224.—(*j*) *Wallis v. Brightwell*, 2 P. Will. 88; *Brodie v. Barry*, 2 Ves. & Bea. 130; *Anstruther v. Chalmer*, 2 Cond. Cha. Rep. 285; *Curling v. Thornton*, 2 Eccle. Rep. 197; *Larpent v. Lindry*, 3 Eccle. Rep. 166; *In the Goods of Reid*, 3 Eccle. Rep. 207; *In the Goods of Maraver*, 3 Eccle. Rep. 218; *Armstrong v. Lear*, 12 Wheat. 169; *Desesbats v. Berquier*, 1 Bin. 336; *Burnley v. Duke*, 1 Rand. 108; *De Sobry v. De Laistre*, 2 H. & J. 195; *Vattel*, b. 2, ch. 8, s. 111.—(*k*) *Roberdeau v. Rous*, 1 Atk. 544; *Brodie v. Barry*, 2 Ves. & Bea. 131; *Elliott v. Lord Minto*, 6 Mad. 16; *The United States v. Crosby*, 7 Cran. 115; *Kerr v. Moon*, 9 Wheat. 565; *Binney's Case*, ante 145.—(*l*) *Roach v. Garvan*, 1 Ves. 158; *The King v. Brampton*, 10 East. 282; *Lautour v. Teesdale*, 4 Com. Law Rep. 299; *Ruding v. Smith*, 4 Eccle. Rep. 551; *Scrimshire v. Scrimshire*, 4 Eccle. Rep. 562; *Harford v. Morris*, 4 Eccle. Rep. 575; *Middleton v. Janverin*, 4 Eccle. Rep. 582.

marriage, or remains subject to be disposed of by her last will, or otherwise, as regulated by the law of their domicil, as selected by him, (m) and subject to the claims of his and her creditors accordingly. (n) As where the husband is allowed, by the law of their domicil, to sue for and recover his wife's personal estate in equity, without making any settlement upon her, on the ground of what is here called 'the wife's equity,' the sum claimed and due in her right, will accordingly be ordered to be paid to him without his making any such settlement upon her. (o)

Upon the ground of this duty which the state owes to its citizens, the general assembly of Maryland have, by sundry legislative enactments, provided, that where an infant, who has no natural or testamentary guardian, may be entitled to real estate by descent or devise, or to personal property by bequest, or in a course of distribution, or may have acquired any property by gift or purchase, the Orphans Court of the county where the land lies, or in which administration of the personal estate is granted, shall have power to appoint a guardian to such infant until the age of twenty-one years, if a male, and until the age of eighteen, if a female, or marriage; and that such guardian shall be charged with the care, maintenance and education of such infant, and with the management of his or her estate. (p) Declaring, however, in connection with those general provisions, that nothing therein contained should be construed to affect the general superintending power exercised by the Court of Chancery with respect to trust. (q)

Now, on recollecting what has been before said as to the jurisdiction of the Court of Chancery, as the representative of the state, in its duty to infants as *parens patriæ*; and that by an English statute, passed in the year 1660, and adopted here, *fathers* have been authorized to appoint guardians to their legitimate infant children, (r) it clearly appears, that the ordinary tribunals, whose jurisdiction has been thus defined, cannot appoint a guardian to any infant whose father or mother is alive; or who has a testamen-

(m) *Lashley v. Hog*, Robbins' Succession, 430.—(n) *Feaubert v. Turst*, Prec. Cha. 207; *The Goods of Maraver*, 3 Eccle. Rep. 218.—(o) *Minet v. Hyde*, 2 Bro. C. C. 663; *Bourdillon v. Adair*, 3 Bro. C. C. 227; *Campbell v. French*, 3 Ves. 321; *Sawer v. Shute*, 1 Anstr. 63; *Dues v. Smith*, 4 Cond. Cha. Rep. 257.—(p) 1715, ch. 39, s. 13 and 15; 1798, ch. 101, sub ch. 12; 1807, ch. 136, s. 4; 1829, ch. 216, s. 5; 1831, ch. 305, s. 5 and ch. 315, s. 8, 9 and 11.—(q) 1798, ch. 101, sub ch. 12, s. 16; 1831, ch. 315, s. 17.—(r) 12 Car. 2, c. 24; *Kilty Rep.* 238; 1798, ch. 101, sub ch. 12; *Villareal v. Mellish*, 2 Swan. 536, note.

tary guardian; or who has no property any where; or whose land does not lie within the body of any county of this state; or upon whose personal estate no administration can be granted by any Orphans Court of this state; and recollecting, moreover, that all guardians are considered as trustees, and as such, responsible in chancery, whose jurisdiction, in that respect, has been expressly saved, it will be seen, that the Chancellor has a large scope of jurisdiction lying entirely beyond that of the ordinary tribunals, in addition to that wide space of authority, founded on the doctrine of trusts, which may, as in calling guardians to account, and the like, be exercised in concurrence with those tribunals. (s)

It has been declared that every female orphan shall be accounted of full age to receive her estate at the age of *eighteen* years, or day of marriage, which shall first happen; (t) and such female infants have been endowed with a capacity, after that age, to execute a release to their guardians on receiving it; (u) and also with a ca-

(s) *HEPBURN v. HEPBURN*.—This bill was filed by John Hepburn, an infant, by Henrietta Maria Walker, his mother and next friend, against Samuel Chew Hepburn, his guardian, for an account, &c. The defendant answered, and the case was brought before the court.

16th April, 1791.—*HANSON, Chancellor*.—The Chancellor is of opinion, that this court hath an undoubted authority to interpose in the affairs of all infants under the care of guardians, on the application of their nearest friends. As it appears, both from the bill and answer, that at least the education of the complainant hath been neglected; and that there does not exist, between him and the defendant, such a confidence and good will as ought to prevail between persons connected by a two-fold endearing relation; as the defendant admits a balance in his hands, belonging to the complainant, under the last will of his father John Hepburn, jun., to a considerable amount in current money and tobacco; as the complainant, on attaining full age, will be entitled to a considerable estate, both real and personal; as the Chancellor conceives it proper for the complainant to be educated and maintained according to his rank; as it is even most eligible for the defendant to dispose of the said balance under the direction of this court; and as the defendant has expressed a willingness to be directed in that respect by this court:

It is *Adjudged and Ordered*, that the defendant deliver unto Henrietta M. Walker, the complainant's mother, on or before the first day of June next, the sum of £35 current money, and the like sum of £35, quarterly, until the complainant shall attain his full age of twenty-one years; and that the receipt of the said Walker shall be good against the complainant. And it is further *Adjudged and Ordered*, that the said Henrietta M. Walker, provided she accept the trust in her hereby reposed, shall apply the said money to the maintenance and education of the complainant, and not otherwise. And that, in respect to education, the said trustee, Mrs. Walker, shall act agreeably to the wish and inclination of the complainant; it being the intent and meaning of this order, that the said money shall be paid to the said trustee, whether the complainant be kept at school, or otherwise.

(t) 1715, ch. 39, s. 15; 1829, ch. 216, s. 5.—(u) 1829, ch. 216, s. 7, and, since, with a capacity to execute powers of attorney for such purposes; 1831, ch. 305, s. 5.

capacity then to make a will disposing of their real estates. (x) Yet, as it has been held that such females cannot be deemed of full age for any other purpose, or in any other respect, (y) it would seem necessarily to follow, that female orphans between the ages of eighteen and twenty-one years, who have no testamentary guardian, being a class of infants for whom a guardian cannot be appointed by the Orphans Court, (z) guardians can only be provided for them by the Chancellor. It is admitted, on all hands, that the father is the natural guardian of all his legitimate children until they attain twenty-one years of age, or until the females attain that age or marry. But it seems to be doubtful whether the guardianship of a *mother* over her children continues longer than the age of *fourteen*; (a) if not, then it would seem, according to a fair construction of the before-mentioned legislative enactments, so far as the courts of ordinary jurisdiction may be permitted to assume any constructive power under them, (b) that a guardian may be appointed by them during the residue of such infancy. But in such case, and in all others, where the ordinary tribunals have no power to make an appointment; as in case of the lunacy or incompetency of a natural or testamentary guardian; (c) or where, because of the limited jurisdiction of those tribunals, they are incompetent to grant relief suited to the peculiar nature or exigency of the case, the general jurisdiction and power of the Chancellor, which has been in no way abolished or diminished, may be resorted to and applied with effect. (d)

The proper education of youth has, every where, and at all times, been held to be a matter of great and important interest to the state. (e) In England there has always been a religion, or church, by law established, which, by considering the clergy as one of the three estates of the realm, has been interwoven with the fundamental law and constitution of the nation. The regulation of schools has, therefore, in England, to a certain extent, been

(x) 1798, ch. 101, sub ch. 1, s. 3.—(y) *Smith v. Williamson*, 1 H. & J. 149; *Davis v. Jacquin*, 5 H. & J. 100; *Bowers v. The State*, 7 H. & J. 32; *Crapster v. Griffith*, ante 7.—(z) 1798, ch. 101, sub ch. 12; 1807, ch. 136, s. 4.—(a) *Eyre v. Shaftsbury*, 2 P. Will. 116; *Roach v. Garvan*, 1 Ves. 158; ——— *v. ———*, 2 Ves. 374; *Villareal v. Mellish*, 2 Swan, 536, note; *The King v. Oakley*, 10 East. 491; 2 Fonb. 237; *Hay v. Conner*, 2 H. & J. 347; *Jarrett v. The State*, 5 G. & J. 28.—(b) 1798, ch. 101, sub ch. 15, s. 20.—(c) *Beaufort v. Berty*, 1 P. Will. 706; 1 Blac. Com. by Chit. 463, note 12; 1798, ch. 101, sub ch. 4.—(d) *Beaufort v. Berty*, 1 P. Will. 705; *Roach v. Garvan*, 1 Ves. 158.—(e) *Beaufort v. Berty*, 1 P. Will. 703; *Vattel*, b. 1, ch. 11, s. 112.

subjected to that ecclesiastical establishment. (*f*) And consequently the authority of the English Chancellor to interfere with, and direct the religious education of infants, so far at least as to prevent them from being brought up in the belief of any religious creed, in direct and open violation of that of the established church, is founded upon this fundamental law and on that obligation by which all judicial officers are bound to support the constitution of their country. (*g*) Before the revolution, a religious creed having been established by law here, a similar obligation was imposed upon the courts of justice here, to take care of what was then deemed the proper religious education of infants in Maryland. (*h*)

It has, however, been declared, by the constitution of this republic, 'that, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him, all persons professing the christian religion are equally entitled to protection in their religious liberty,' &c.; (*i*) and also, 'that the liberty of the press ought to be inviolably preserved.' (*j*) And it having also been declared, by the constitution of the United States, that 'congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press.' (*k*) It follows, that none of the public functionaries of this state, or of the Union, can exercise any authority at variance with those great rules of fundamental law by which the freedom of religious and political opinions are secured to our citizens. Consistently, however, with those constitutional provisions, it may, nevertheless, be held to be within the scope of the Chancellor's jurisdiction in the case of infants, to have them removed from under any open or direct immoral and vicious influence or example; as from the tuition of an infamous convict; (*l*) where the infant could not fail to be engaged in vicious pursuits, or be prevented from acquiring those virtuous principles and habits indispensable to the formation of a good and useful citizen. (*m*)

(*f*) Cox's case, 1 P. Will. 29; *In re Masters*, &c. of the Bedford Charity, 2 Swan, 522.—(*g*) *Storke v. Storke*, 3 P. Will. 51; *Roach v. Garvan*, 1 Ves. 158, and Supp.; *Villareal v. Mellish*, 2 Swan, 533; *Blake v. Leigh*, Amb. 306; *De Manneville v. De Manneville*, 10 Ves. 61; *Wellesley v. Beaufort*, 3 Cond. Cha. Rep. 11; *Lyons v. Blenkin*, 4 Cond. Cha. Rep. 115; *Shelley v. Westbrooke*, 4 Cond. Cha. Rep. 126.—(*h*) 1715, ch. 39, s. 10; 1729, ch. 24, s. 12.—(*i*) Decla. Rights, art. 33.—(*j*) Decla. Rights, art. 38.—(*k*) Const. U. S. amend. art. 1.—(*l*) 1798, ch. 101, sub ch. 4.—(*m*) *Beaufort v. Berty*, 1 P. Will. 703; *Storke v. Storke*, 3 P. Will. 51; *De Manneville v. De Manneville*, 10 Ves. 61; *Whitfield v. Hales*, 12 Ves. 492; *Ball v. Ball*, 2 Cond. Cha. Rep. 299; *Wellesley v. Beaufort*, 3 Cond. Cha. Rep. 1; 2 Lond. Jurist, 66; *Jones v. Stockett*, ante 428.

But, although the state has thus, by its constitution, withheld from all who may be entrusted with public authority, all power over the religious or political opinions of its citizens, infant or adult; yet it has a large interest in having her infants educated under the influence of that very freedom which has been secured to them. And, therefore, the Chancellor here, as in England, looking to his constitutional duties, in this respect, would not suffer a guardian to send his ward abroad, or out of the United States to be educated, where principles adverse to our institutions must necessarily be inculcated, and might be too copiously imbibed. (n) And although parents of infants may well be indulged upon the ground of their own right to leave this country at pleasure, to take with them their infant children wherever they may go, (o) yet the court will not allow a father, under the colour of his parental authority, to work the ruin of his child, or suffer the child to be in any way sacrificed to his views; (p) nor will it concede to any mere legal guardian an unlimited power to dispose of his ward as he may think proper; since the state has a deep interest in retaining and educating her own infants, with a view to her own strength and improvement. (q) And as an infant cannot, of himself, acquire any domicile, but always retains that of his parents, or of his origin, so his having been left here as an orphan devolves upon the state a right to retain him within its jurisdiction for its own benefit, as well as for his own advantage. And therefore a guardian merely constituted such by law, is never permitted, at his pleasure, to change the domicile of his ward for any purpose, much less with a fraudulent intent to alter the rule of succession to his property from that by which it would have been governed according to the law of the domicile from which he was removed. (r)

According to the established principles of international law, no one nation can, under any pretext, interfere with the internal regulations or domestic concerns of another; nor can any one nation be allowed to withdraw from another any of its citizens, to impair its strength, or to diminish its resources in any way whatever. Subject, however, to these fundamental axioms, individuals are per-

(n) *Mountstuart v. Mountstuart*, 6 Ves. 363; *De Manneville v. De Manneville*, 10 Ves. 56; *Lyons v. Blenkin*, 4 Cond. Cha. Rep. 115; *Vattel*, b. 1, ch. 11, s. 114.—
 (o) *Lashley v. Hog Robin*. Succession, 430.—(p) *Creuze v. Hunter*, 2 Cox, 242.—
 (q) *Skinner v. Warner*, 2 Dick. 779; *Ex parte Warner*, 4 Bro. C. C. 101; *Wellesley v. Beaufort*, 3 Cond. Cha. Rep. 14; *Lyons v. Blenkin*, 4 Cond. Cha. Rep. 115.—
 (r) *Somerville v. Somerville*, 5 Ves. 750; *Pottinger v. Wightman*, 3 Meriv. 68; *Dessebats v. Berquier*, 1 Bin. 336.

mitted, in time of peace, freely to migrate from one nation to another, and to take with them their infant children and property, or to have their moveables transported any where; provided they do so fairly and without prejudice to the state, or to any one; as in the cases and upon the principles before explained. Whence, it is clear, that, under the law of nations, the free removal of persons and of property, from one state to another, can only be restrained, upon the ground of a duty of the state to itself, or to its own citizens; and that, apart from those restrictions, no infant or adult can be in any way hindered or embarrassed in withdrawing his property from any other state into that of which he is a resident citizen, or within which he has his domicile.

It is universally admitted, that immoveable property of all descriptions, must be regulated by the law of the state within which it is situated. But a foreigner, or a non-resident, who may be permitted to hold such property, must, as a necessary consequence of that permission, be allowed to collect and have remitted to him, its rents and profits. A living adult owner may, by a sufficiently authenticated power, cause the rents and profits of his real estate, or the whole of his personal estate to be transmitted to him any where beyond the jurisdiction of the state. And by a comity, now prevalent among all civilized nations, founded on this concession to living owners, qualified by a proper regard to itself and its citizens, an administration granted under the law of the deceased's domicile, is so far recognized by every other nation as to be considered as *the administration in chief*, to which the administration taken out in the state where the property is found, is only auxiliary; and to which administration in chief, the surplus must be handed over for the purpose of distribution. And so too, marriage, if valid where solemnized, being recognized as valid every where, vests in the husband full authority to cause his wife's personal property to be transferred to any place he may think proper.

An infant is incompetent, by reason of his infancy, to clothe any one with a power to dispose of his property; and yet his right to have it removed, during his infancy, is as perfect; and the benefit of removal may be, and often is, much greater to him than to an adult owner. Hence, it is laid down, that it belongs to the domestic judge to appoint a guardian to an infant; and that the law of nations, which has an eye to the common advantage and the harmony of states, requires the appointment of such a guardian to be recognized as valid in all other countries in which the infant

may have any concerns. (s) An administration granted abroad, and the assignees or trustees appointed under the bankrupt or insolvent laws of another state, are not allowed to have any authority here, in order that the interests of the state and of its citizens, may be protected. But no such reason can exist for refusing to recognize the appointment of a guardian of a foreign infant, made under the laws of the state to which he belongs. An infant being incompetent to contract, or to incur debts for any thing more than mere necessities, the irresistible presumption is, that he can have no creditors beyond the immediate sphere of his domicile; and consequently, there can be no probability, that any of our citizens would be at all prejudiced by allowing to a foreign infant, by his foreign guardian, the same kind of right of removing his effects beyond the reach of our laws, which has been so freely conceded to a foreign adult.

But if it were held to be necessary to have the moveables belonging to a foreign infant, placed in the hands of a guardian appointed here, it would be in effect, to determine that his property should be withheld from him during the whole term of his infancy; or at least, that it should be exposed to the great risk and expense of a foreign management, where the extent of his wants could not be correctly estimated, and the seasonable application of the profits of his estate to his necessary calls could not be made. In short, the recognition of the appointment of a guardian to a foreign infant, under the law of his domicile, is a courtesy which may be safely and readily reciprocated among nations, without the slightest injury to any one, and with the greatest benefit to infant owners every where. Therefore, the reason, the justice, and the necessity of such cases, obviously require such a general and mutual recognition; and that the authority of such an agent should be every where regarded as having the same extent as the authority of an adult owner himself, in so far as it may be necessary to sue for, collect, and remove his personal estate, and the rents and profits of his lands, without contravening the law of the state where such land may be situated, as to the right and title to it. (t)

(s) Vattel, b. 2, c. 7, s. 85; Kames' Pri. Eq. b. 3, c. 8, s. 1; *Ex parte Otto Lewis*, 1 Ves. 298.—(t) *Arglasse v. Muschamp*, 1 Vern. 75; *Kildare v. Eustace*, 1 Vern. 419; *Ex parte Otto Lewis*, 1 Ves. 298; *Ex parte Annandale*, Amb. 80; *Cranstown v. Johnston*, 3 Ves. 170; S. C. 5 Ves. 277. In the matter of the Duchess of Chandois, 1 Scho. & Lefr. 301; *Cartwright v. Pettus*, 2 Chan. Ca. 214.

It must be recollected, however, that although there is an obvious propriety in recognizing the appointment of a guardian so made, under the law of one state in every other state; yet, that when this court is called upon, in respect of any property found here, belonging to an infant foreigner, to appoint a guardian for him, for the purpose of having it taken care of, no one can be appointed who is not a resident within its jurisdiction, so as to be held responsible, and subject to its control; because no state can extend its process, or give efficacy to its judicial power, or its laws beyond its own jurisdiction. (*u*) And so too, where an infant has been improperly, or illegally removed into a foreign country, there, from necessity, the guardian here must be authorized to remit, or have applied, as well as circumstances will admit, the annual income of his estate for his maintenance and education. (*w*)

But it is believed, that there is no well considered English adjudication, by which it has been determined, in opposition to the rule laid down by the most eminent writers on public law, that the appointment of a guardian to a foreign infant, under the law of his domicil, must be recognized and allowed every where else.

In the case under consideration, this court is called upon to appoint a guardian to several male and female infants by their father and natural guardian; for whom, even if they had no natural guardian, it is at least questionable, whether any of the Orphans Courts could appoint a guardian; because the lands of these infants do not lie any where within this state; and because no administration could be granted here of the personal property, lying within the British dominions, which has been bequeathed to them, by one who died abroad, who was not domiciled within this state, and who left no property here. Their case is, in these respects, peculiar. But being citizens of Maryland, it is the duty of this state to protect their interests; and the discharge of that duty, by virtue of the general jurisdiction with which he has been clothed in such cases, devolves upon the Chancellor. According to the principles of equity by which this court is governed, where property has been in any way acquired by an infant, whose parents are living, it may, if necessary, provide for its preservation, either independently of such natural guardian, or by compelling him to give

(*u*) Vattel, b. 2, c. 7, s. 84; *Ex parte* Ord. 4 Cond. Cha. Rep. 44; *Logan v. Fairlee*, 4 Cond. Cha. Rep. 90.—(*w*) *Roach v. Garvan*, 1 Ves. 158; *Stephens v. James*, 7 Cond. Cha. Rep. 197.

security for its safety, (x) and in addition to this general authority of this court, it has been expressly declared, not only as formerly, that a natural guardian may be called on by the Orphans Court to give bond for the performance of his trust; (y) but that every natural guardian, or guardians appointed by last will, shall give bond, with sureties to be approved by the Orphans Court, and shall be under the like regulations as are prescribed with respect to other guardians. (z)

Here it is not only necessary to provide for the safety of the property belonging to these citizen infants; but, as it is to be collected and brought here for their benefit, from abroad, it becomes necessary, for the purpose of facilitating its removal, to affirm the natural guardianship of their father by the high authority of this court; and thus have the legality of his power, authenticated under the great seal of the state, which, by the law of nations, is accredited every where; (a) so that by virtue of such appointment, he may be enabled at once, to collect and bring into this state, all their moveable effects, and to dispose of their immoveables in such manner as the law of the place may allow.

Decreed, that the petitioner, *James Corrie*, of the city of Baltimore, be, and he is hereby appointed guardian to each one, and to all of his said infant children, that is to say, *Frances Corrie*, *James Corrie*, *Margaret Corrie*, *Samuel Corrie*, *Theresa Corrie*, *William Corrie*, *Daniel Corrie*, and *Alexander Corrie*; with full power and authority as such, to ask, demand, sue for, collect and take possession of all debts, legacies, devises, rights, effects, and property of the said infants, lying or being any where beyond the

(x) *Dagley v. Tolferry*, 1 P. Will. 285; *Butler v. Freeman*, Amb. 302; *Colson v. Morris*, 4 Cond. Cha. Rep. 121, note.—(y) 1798, ch. 101, sub ch. 12, s. 3.—(z) 1816, ch. 203, s. 1.—(a) *Anonymous*, 9 Mod. 66; *The United States v. Johns*, 4 Dall. 416; *Church v. Hubbard*, 2 Cran. 187; *Peake's Evid.* 73, note.

On the petition of William Winchester, and Henrietta his wife, stating, that Henry Irwin, of Pennsylvania, died there intestate, leaving real and personal estate there, and a widow, the sister of the petitioner, with four infant children, Ann Irwin, Mary Irwin, Henry Irwin, and Ellen Irwin; that a certain Thomas T. Cromwell, was there appointed administrator of the deceased's personal estate, and a certain Benjamin Cornelius, guardian to his infant children; and that afterwards, the widow, with these, her four infant children, removed into, and became residents of this state, where she died. Whereupon it was prayed, that the petitioners might be appointed their guardian. Upon which petition, by an order passed on the 29th of June, 1830, the Chancellor appointed them guardians of those infants, as prayed. It is understood that the propriety and validity of this appointment, has been repeatedly recognized in the state of Pennsylvania.

jurisdiction of this state; and to give receipts and releases for the same; and to make sale or dispose of the same in any manner he may deem most advantageous for the said infants, so that the same, or the proceeds thereof, may be transferred to, and brought within the jurisdiction of this state, where the same may be taken care of, accounted for and distributed, according to law, among the said infants, or those to whom the same may respectively belong. And that the said *James Corrie*, before he acts as guardian, shall file with the register, a guardian's bond, in the form prescribed by law, in the penalty of ten thousand dollars, with surety to be approved by the Chancellor.

WATKINS v. WORTHINGTON.

In a creditor's suit, creditors who come in after answer, and before a decree, cannot have their claims so put in issue as to be adjudicated upon by the decree; yet such creditors may well be heard as to the selection of a trustee to make the sale.—In the appointment of a trustee the recommendation of those creditors who shew the greatest amount of debts will be allowed to have the most weight.—The auditor's report confirmed as to all claims not objected to by him.

Where it appears from the voucher filed by a creditor as evidence of his claim, that the deceased was jointly liable with others, the creditor must shew whether or not the deceased was equally bound as a debtor, or as principal, or surety; or whether he was bound with others as co-surety.—If he was bound as principal, then the creditor is allowed to come in for the whole amount; otherwise for only a proportion of his claim.—The reasons and grounds of these rules examined and considered.

The interests of infant defendants should be protected as far as practicable; but the parol cannot demur; nor can the claims of others be in any way impaired in their favour.—The course of proceeding against persons *non compos mentis*, and against *femes covert*.—Where the debt is joint and several all the debtors must be brought before the court; the exceptions to this rule.—The general rule, that all persons interested must be made parties, is made to yield where necessary, either as to plaintiffs or defendants.—A creditor's suit does not profess to be the demand of a single creditor; but is a call for the administration of the estate for the benefit of all.—The principles of law and equity in relation to principal and surety.—The principles of equity in relation to the marshalling of assets and securities.—The rules of equity in bankruptcy as applicable in a creditor's suit.—It is not within the scope of the judicial authority to diminish the force of a contract; and the legislature has been restrained from passing any law impairing the obligation of contracts.—A man may make use of all the securities he has, until he has obtained satisfaction of his whole debt.—As to proof of the nature of the contract; whether the deceased was principal or surety; or the insolvency of a co-obligor.—The assignee of a *chose in action* takes it subject to all the equity to which it was liable in the hands of the original holder; the exceptions to this rule.

THIS bill was filed on the 9th of July, 1825, by *Nicholas Watkins* and *Adam and John Miller*, against *Christiana M. Worthing-*

ton, *Nicholas Worthington*, *Brice I. Worthington*, *Mary W. Worthington* and *Betty Worthington*. The bill sets out, that the plaintiffs sue in behalf of themselves and others, creditors of *Beale M. Worthington*, deceased; that the deceased died indebted to the plaintiff *Watkins* in the sum of \$234 04, with interest from the 9th of February, 1824, on a note under seal; and unto the plaintiffs *Adam* and *John Miller* on a similar instrument of writing in the sum of \$397 17, with interest from the 1st of April, 1824; that the just debts of the deceased were very large, and that his personal estate was totally insufficient to discharge them; that the deceased died intestate, and *George Wells, Sr.* had obtained letters of administration on his personal estate; and that the deceased had left a widow *Elizabeth R. Worthington*, and the defendants his children and heirs, all of whom were minors. Whereupon the bill prayed, that the real estate left by the deceased might be sold for the payment of his debts; and that the plaintiffs might have such other and further relief as the nature of their case might require.

On the 1st of November, 1826, the infant defendants answered by their guardian and said, that they had no knowledge of the matters stated in the bill, and submitted to such decree as the Chancellor should think proper to make.

On the 9th of March, 1827, *The President, Directors and Company of the Farmers' Bank of Maryland*, by their petition stated, that they were creditors of the said *Beale M. Worthington*, deceased, to a very large amount, and could only be paid out of the proceeds of the sale of his real estate. Whereupon they prayed to be permitted to come in as parties complainants, and to substantiate their claim as might be required.

10th March, 1827.—BLAND, Chancellor.—Ordered, that the said petitioners be and they are hereby permitted to become parties complainants as prayed.

After which *John Ridgely* filed a similar petition stating, that he also was a creditor of the deceased to the amount of \$406; and prayed to be allowed to come in as a co-plaintiff; which by an order of the 29th of December, 1827, was granted. The original plaintiffs recommended *G. Wells, Jr.* as trustee; and the solicitor of the petitioners recommended *L. Gassaway* for that office. Upon which the case without objection or opposition was submitted for decision.

5th May, 1828.—BLAND, *Chancellor*.—As this is a creditor's suit, in which it is evident, that there must be a sale of the real estate of the deceased for the payment of his debts, it stands now, according to the course of the court, ready for a decree to that effect, without having been regularly set for hearing; and it has been submitted accordingly, without argument or controversy of any kind; except as to who shall be appointed trustee to make the sale. The original plaintiffs recommend *G. Wells, Jr.* and the petitioners, who have been admitted as co-plaintiffs, recommend *L. Gassaway*. The petitioners have been permitted to come in since the defendants had answered; the suit, therefore, as to such petitioners has been, in effect, so instituted as not to call on the defendants to answer as to a bill of complaint against them; and consequently, as the validity of the petitioners' claims have not, as yet in any way, been put in issue, the decree now about to be passed for a sale cannot, in any respect determine, that they, like those of the original plaintiffs, not having been contested, must be taken to have been sufficiently established. Nevertheless, so far as regards the appointment of a trustee, the recommendations of such creditors may be allowed to have their due consideration. (a) Here, however, the bank merely alleges, that it is a creditor of the deceased *to a very large amount*, without saying how much; and the petitioner *Ridgely* states his claim to be about \$400. Therefore, as the parties have given no reasons for their recommendations, the Chancellor must allow that of the original plaintiffs to have the greatest weight, as they have at this time shewn the largest specified amount of claims.

Decreed, That the real estate, whereof *Beale M. Worthington* died seized, or possessed, or so much thereof as may be necessary, be sold for the payment of his debts; that *George Wells, Jr.* be appointed trustee, to make the sale, &c. &c.; which sale shall be on a credit of four, eight, and twelve months from the day of sale, with interest, &c. &c.; and that the trustee give notice to the creditors of the deceased to file the vouchers of their claims within four months from the day of sale.

After which, *Elizabeth R. Worthington*, by her petition, stated, that she was the widow of the late *Beale M. Worthington*, and as such, was entitled to dower in the real estate, of which he died

seized; and which had been decreed to be sold. Whereupon she prayed, that a commission might be issued, to assign dower to her. And recommended *Thomas H. Dorsey, James Wells, Eli Lusby, Jacob Waters, and Caleb Dorsey*, to be appointed commissioners for that purpose.

2d July, 1828.—BLAND, *Chancellor*.—The bill states, that *Beale M. Worthington*, the deceased, left a widow, *Elizabeth R. Worthington*, and the infant children, these defendants, his heirs; and then prays, that the real estate of the deceased may be sold for the payment of his debts. Hence, taking this petitioner to be the widow mentioned in the bill, it virtually recognizes her legal right to dower; and therefore, there need be no hesitation in at once, according to the established course of the court in similar cases, either granting a commission to have dower assigned to her, or in directing the land to be sold subject to her claim; or in awarding to her a proportion of the purchase money in lieu thereof. But, as in this case, the widow is not a party to the suit; and the defendants are infants; it may not be amiss to allow the plaintiffs to show cause, if any they have, why a commission should not issue as prayed, leaving the application open to any further objections when the court shall, upon the return of the commissioners, be called on for a decree confirming the assignment of dower so made to her. (b)

Ordered, that a commission issue as prayed, to the persons recommended; unless cause to the contrary be shewn on the 16th instant; provided, that a copy of this order, together with a copy of the foregoing petition and recommendation, be served on the plaintiffs or their solicitor, on or before the 9th instant.

The plaintiffs consented that a commission should issue as prayed, which was issued accordingly. Upon which, the commissioners made return, that they had assigned to the widow her dower, according to certain metes and bounds as therein specified, and as shewn by the annexed plot thereof. (c)

The trustee appointed to make the sale, reported that he had, on the 4th of April, 1829, made sale of the real estate as directed

(b) *Mildred v. Neill*, ante 354; *Ewing v. Ennals*, ante 356.—(c) It appears from the auditor's report, subsequently made and passed upon in this case, that the expenses of the survey for making the assignment of dower, were allowed out of the proceeds of the sale; but no decree confirming to the widow her dower, was ever called for or passed.

by the decree, in several parcels, by the acre, amounting to \$6,352 63; which sales were, on the 10th of August, 1829, finally ratified and confirmed; and that he had also, as directed, given notice to the creditors of the deceased to bring in their claims.

After which, about forty creditors filed the vouchers of their claims. It appeared from the evidences of the claim of *James Deale*, that it was upon a note drawn in favour of, and endorsed by the deceased; and from those of the Farmers' Bank, that they were notes drawn by *William Warfield* in favour of, and endorsed by the deceased; or by *John W. Clagett*, in favour of, and endorsed by the deceased; or by *D. Ridgely & Co.* in favour of, and endorsed by the deceased. In relation to these claims, the affidavit of *John W. Duvall*, was taken and filed, in which he states, that from his own knowledge, *William Warfield*, then deceased, was insolvent; that he verily believed, and had so understood from others, that *William Warfield*, then deceased, *David Ridgely*, and *John W. Clagett*, who composed the late firms of *Warfield & Ridgely*, and *D. Ridgely & Co.* were insolvent, and unable to pay their debts; and that he verily believed, and from general reputation, the above mentioned firms, and the individuals composing them, have been considered as utterly insolvent, and were still so. And also, the affidavit of *Robert Welch*, of *Ben.* in which he stated, that from his own knowledge, and from what he had understood from others, he verily believed, that *William Warfield*, then deceased, *David Ridgely*, and *John W. Clagett*, who composed the late firms of *Warfield & Ridgely*, and *D. Ridgely & Co.* were insolvent and unable to pay their debts; that all process of writs of *fieri facias* against the said firms, and the individuals composing them, which came into his hands as sheriff of Anne Arundel county, were returned *nulla bona*; that he was a creditor to a large amount, of which he had never received one cent; and that from general reputation, the firms, and the individuals composing them, as above stated, have been considered as utterly insolvent, and were still so.

On the 25th of September, 1829, the auditor filed his report, made up to the 23d instant, in which he says, that he had stated all the claims which had been exhibited against the estate of the deceased; that he had also stated an account between the said estate and the trustee, in which the proceeds of sales were applied to the payment of the trustee's allowance for commissions and expenses, the

costs of survey and of suit; and dividends on all the claims so stated. But that the account was stated, subject to the following objections to particular claims. *James Deale's*, No. 3, and the bank's, No. 26, were founded on notes drawn by *William Warfield*, in favour of, and endorsed by the deceased to the present claimants. The bank's, No. 18, was on *John W. Clagett's* note, in favour of, and endorsed by the deceased to the present claimants. The bank's, Nos. 19, 20 and 25, were founded on notes of *D. Ridgely & Co.* in favour of, and endorsed by the deceased to the present claimants. The bank's, No. 21, was on *Warfield & Ridgely's* note, in favour of, and endorsed by the deceased to the present claimants. That those claims could not be allowed without proof of the insolvency of the drawers. That affidavits had been filed by the claimants, as evidence of such insolvency; which were deemed insufficient; because they spoke only from the belief of the deponents, and from general reputation. But individual opinion or general reputation, furnished no such clear evidence of the utter insolvency of the principal debtor, as to give to the creditor his equity against the estate of his surety. That the general testimony of the affidavit, that all process of writs of *fieri facias*, had been returned *nulla bona*, was not evidence of any return upon a judicial writ. That if any evidence, short of a discharge, under the insolvent laws, were admissible, there should be proof of *nulla bona* on executions issued by the claimants to collect the very debt then claimed; since the rule of the court required some evidence of the exercise of reasonable diligence on the part of the creditor, to enforce payment from the principal debtor; and did not permit the creditor to derive any assistance from the inconclusive acts of other creditors.

The auditor further said, that *George Wells'* claims, Nos. 39, 40, 41 and 42, were debts due from the deceased to *Warfield & Ridgely*, and *D. Ridgely & Co.*, and assigned by them to the present claimant. That the deceased had in his life-time, endorsed sundry notes drawn by the said firms, which remain unpaid, and were then exhibited as claims against the deceased's estate; but as the assignee should take subject to all the equities which might have been raised against the claims, in the hands of the original creditors, no part of said claims should be allowed until the deceased's estate has been indemnified against the said endorsements. The amount of the endorsed notes greatly exceeds the amount of the aforesaid claims. The auditor further said, that *A. & J. Miller's* claim, No.

44, originated after the death of the deceased, and ought not to be allowed; and in conclusion said, that he understood a distribution of personal estate had been made by the deceased's administrator; but no dividends were credited on *George* and *John Barber's* claim, No. 1; *John W. Duvall's*, No. 5, *Charles T. Flusser's*, No. 7; *Henry Hammond's*, No. 8; *A. & J. Miller's*, No. 13, 14, 35 and 44; *Joseph Phelps'*, No. 16; *John Randall & Son's*, No. 27; *C. Salmon's*, No. 32; *George Shaw's*, No. 33; *Anderson Warfield's*, No. 37; *George Wells'*, Nos. 39, 40, 41 and 42; or *Henry Wilmot's*, No. 43. Upon this report of the auditor, the case was submitted, as to all such matters as were not controverted.

15th May, 1830.—BLAND, *Chancellor*.—Ordered, that the report of the auditor be, and the same is hereby ratified and confirmed; and the trustee is directed to apply the proceeds accordingly. Bnt all claims to which any objections whatever have been made, as therein mentioned, are hereby reserved until further order.

On the 18th May, 1830, the claimant, *James Deale*, excepted to this report; *first*, because it did not appear from any part of the proceedings, that *Beale M. Worthington* was surety for *William Warfield*; and if *Worthington* was a surety, it was not necessary to prove the insolvency of *Warfield*; and *second*, because the affidavits of *Duvall* and *Welch*, afford sufficient evidence of such insolvency. And on the 20th of May, 1830, *The Farmers' Bank of Maryland*, a creditor, also excepted to this report; *first*, because there was no evidence that *Beale M. Worthington* was surety on the notes which are the foundations of said claims; and did not receive a valuable consideration thereof; and *second*, because if he was, the proof was sufficient of the insolvency of the other parties. And on the same day, *George Wells*, a creditor, in like manner excepted; *first*, because if the objections to claims Nos. 3, 18, 19, 20, 21, 25 and 26 be valid, the estate would be released from the said endorsements; and therefore, the auditor's reasons for rejecting the exceptant's claims would cease; and *second*, because if the objections to Nos. 3, 18, 19, 20, &c. should be over-ruled, it does not appear that this claimant had notice at the time of the assignment, of said endorsements.

10th June, 1830.—BLAND, *Chancellor*.—This case standing for hearing, on the exceptions to the auditor's report, the solici-

tors of the parties were fully heard, and the proceedings read and considered.

The general principles, referred to by the auditor, as the foundation of his objections to the several claims for which the deceased became liable only as an endorser, are these: That wherever it appears, from the voucher filed by a creditor as evidence of his claim, that the deceased was in any way jointly liable with others, the creditor must shew whether or not the deceased was equally bound as a co-debtor, or as principal, or surety, or whether he was bound with others as a co-surety. If he was bound as principal debtor, then the creditor is allowed to come in for the whole amount of his claim. But if the deceased was only bound as one of two or more principal debtors, then the creditor must shew that the other principal debtors are insolvent, or he will not be allowed to come in for the proportion which such other principal debtor might have been made to pay. If the deceased was only a surety, then the creditor must shew that the principal is insolvent, or he will be excluded altogether. And if the deceased was one of several sureties, then the creditor must not only shew that the principal is unable to pay, but that the other sureties are insolvent, or he will not be allowed to claim more than the equitable proportion for which the deceased was liable. If these facts and circumstances do not necessarily or sufficiently appear from the vouchers, filed as the foundation of the claim, then the burthen of explanation and proof is thrown upon the creditors, and that, too, by the *ex officio* act of the court, without any suggestions or objection to that effect being made by any other creditor or party in the case.

When I came here I found that these principles had been considered as long settled; but I have never been able to persuade myself to approve of them; and now, after some years of observation, I am satisfied that they occasion much embarrassment and delay in the administration of the real assets of deceased debtors; and oftener than otherwise result in absolute wrong and injustice to creditors against whom not the slightest misconduct can, in any manner, be imputed. I shall, therefore, as their correctness and true application have been called in question by these excepting creditors, take this occasion to examine the reasons and grounds upon which they have been rested.

It would seem that these principles, in relation to the administration of the real assets of deceased debtors, had been first introduced in the time of Chancellor *Hanson*. Speaking in refer-

ence to this subject, in an order passed on the 20th of March, 1800, he says, 'there is no proof relative to the circumstances of *George Garnet*, or the two other securities, *William Clayton* and *Nathan Wright*. When claims are exhibited against an infant's estate, and it appears that the debt was due from the deceased and another, or others jointly, it has been the Chancellor's uniform practice to allow only the just proportion to come out of the infant's estate. The practice is founded on this consideration, that, on an application by creditors, for the sale of an infant's estate, it is a matter of sound discretion, whether or not the Chancellor will decree a sale. He is governed by circumstances. In case of a debt due from the ancestor or devisor jointly with another who is solvent, the Chancellor might say I will not decree a sale, or I will not suffer you to receive your debt from the infant's estate, because you have it in your power, or had it in your power, since the ancestor's or devisor's death, to recover your whole claim from the other debtor. But the Chancellor conceived, that to avoid circuity of action, and do justice to all, it was proper to charge the infant only his just proportion; or to admit the claim against the estate for only a just proportion, Were *Garnet*, *William Clayton*, and *Nathan Wright* all insolvent? Was one of them solvent, and the others not? Have any steps been taken to recover from them? It is certain, perhaps, that they are now protected by the act of limitations; but is this a reason wherefore *Clayton's* estate is to be charged with the whole?' (d)

During the whole time of Chancellor *Kilty*, these principles appear to have been continually recognized as the settled law of the court; and in one case of a creditor's suit, where he himself was the originally suing creditor, he evidently acquiesced under them, although they were opposed to his own interest; and asked a decision from the judge, to whom his case was necessarily submitted, founded upon their admitted correctness and established authority. (e) But although they appear to have been so repeatedly recognized by Chancellor *Kilty*, yet I have met with no case, in which he has given any reasons by which he had conceived they might be sustained.

Chancellor *Johnson*, in an order passed on the 10th of April, 1822, in a creditor's suit, addressing himself immediately to this subject, says, 'the complainants except to that part of the auditor's

(d) *Hindman v. Clayton*, ante 341.—(e) *Kilty v. Brown*, ante 222.

report unfavourable to the claim of *Nicholas Hammond*, which claim is founded on a bond executed by one *John Mace* and *William Frazier*, the above deceased, as security. The auditor, in conformity with the usual course of the court, would not allow the claim without evidence to establish the allegation in the bill, that *Mace*, the principal debtor, was insolvent. A court of equity, when it interposes and adjusts the relative obligations of contracts and agreements, in which more than two parties are concerned, calls them all before the court; that a complete and final adjustment may take place, and each be compelled to pay his just portion; and thereby, the creditor draws from each, being solvent, what equitably ought finally to be drawn from him. It will not compel the one, both of the debtors being solvent, to pay the whole, and turn him over to his co-security to restore one-half. When, therefore, estates are sold to pay debts; and in which the interests of minors are generally deeply involved, it becomes the duty of the court to see that no claim be allowed, in which the deceased, with others, stands indebted, without satisfactory proof being produced, that the other persons joined in the obligation, were insolvent. But as that proof is now produced in support of the claim No. 4, the same is hereby allowed.' (f)

From these adjudications it appears, that the first position taken in support of these principles, in relation to the administration of the real assets of the deceased debtor, is, that this court may, in its discretion, withhold from the creditor, the relief he asks, altogether, in favour of an infant heir or devisee; and therefore, does no wrong in granting relief upon terms.

The interests of infants, *femes covert*, and persons *non compos mentis*, are always especially attended to, when brought before a court of equity; but I have never understood that the course of justice could be arrested, or in any manner turned awry for their benefit. Their disabilities always excite sympathy, and suggest caution where their interests may be affected; and so far the equitable circumspection of the court in regard to such persons, may be considered as affording to them a just ground to call for the most careful deliberation; and for its *ex officio* protection, so far as may be compatible with a duty to others, and an impartial administration of justice; but under no circumstances, have they been allowed to pervert any such claims to a special consideration

and protection, into a means of impairing the rights of others. There are instances in which a remedy may be suspended in favour of an infant; but it is believed, there is no case in which a court of justice is allowed, at its discretion, to withhold relief from a plaintiff who has established his claim, or to impose such terms upon him, as may greatly delay or endanger the loss of his whole legal right.

At the common law, there are many instances where, on an action being brought against an infant, the parol shall demur; or in other words, where the prosecution of the suit to judgment and execution shall be suspended, until the infant attains his full age. If an action of debt be brought by a bond creditor, against an infant heir, in respect of real assets descended to him, the parol shall demur, until he attains his full age, even though the debt be clear and indisputable. The privilege of the heir himself, is however, in this respect, anomalous, and confined to the heir alone. It was allowed to him as well on account of his inability to defend himself, as also from an absolute deficiency of funds, arising from the nature of the feudal tenures, by which the whole estate, with its rents and profits, were given to the guardian in chivalry. This privilege was, at the common law, for some reasons not now appearing, extended indiscriminately to all heirs; and to cases where judgment having been obtained, and the defendant died before execution, the heir was within age; and in favour of the widow, and all the heirs in co-parcenary during the infancy of any one of the parceners. (*g*)

This legal privilege was distinctly recognized by one of our early acts of assembly; (*h*) and by another of them it has been expressly declared, that all persons under the age of twenty-one years, entitled to any hereditaments by purchase, shall not be obliged to answer any suit in relation thereto, any more or otherwise than they would be if they had become their right by descent. (*i*) Hence it appears, that in all cases where an infant, who takes by purchase, might have had the privilege of causing the parol to demur, had he taken by descent, the like privilege shall be extended to him for the protection of the inheritance held by him as a purchaser. And it was also the practice of the land

(*g*) Co. Litt. 290; Markal's case, 6 Co. 4; Plasket v. Beeby, 4 East. 485.—

(*h*) 1721, ch. 14, s. 2.—(*i*) 1729, ch. 24, s. 16.

office, under the provincial government, to let every thing stand in which an infant was concerned, until he attained his full age. (*j*)

But in equity it is, in some respects, otherwise. The interests of an infant are so far taken care of, that no decree will be made against him, without allowing him to shew cause after he comes of age; and the court never pretends to change the nature of an infant's estate, or make that absolute which was defeasable, or to shield an infant, or his property, from any just stipulation or legal liability which had been fairly incurred in a regular course of law. (*k*) In all cases where the debtor, by his will, charges his real estate with the payment of his debts, any creditor may, in behalf of himself and the other creditors of the testator, by a bill against the executor, devisee, and heir, on establishing his claim, and the insufficiency of the personalty, have the real estate immediately sold for the payment of the debts, notwithstanding the infancy of the heir; because such a devise breaks the descent, or because the real estate is considered as having descended to the heir as a mere trustee for the benefit of the creditors of the testator. (*l*) But where the real estate has not been so charged by the debtor; and has been suffered to descend to his heir, in such case the parol demurred in equity as at common law; and there could be no decree for a sale until the heir attained his full age. (*m*)

The disability of a *feme covert* is also regarded with kind attention by a court of equity, and her interests are carefully protected. Yet she has never been indulged with any such privilege as that of having the proceedings suspended, or of having a day allowed her to shew cause after she became *sole*, as is granted to an infant; but if the plaintiff establishes his case, he has a right to demand an absolute decree against her and her estate. (*n*)

At common law, as in equity, a person *non compos mentis* may be sued, and a judgment or decree obtained against him; he may be arrested and held to bail, or imprisoned for want of bail; but in equity, although he must himself be made a party, yet the court will assign him a committee to appear and defend in his behalf,

(*j*) Land Hol. Ass. 145.—(*k*) Co. Litt. 240; Whittingham's case, 8 Co. 84; Anonymous, 2 Cha. Ca. 163; Cary v. Bertie, 2 Vern. 342.—(*l*) Cooke v. Parsons, 2 Vern. 429; Newton v. Bennet, 1 Bro. C. C. 137; Williams v. Whinyates, 2 Bro. C. C. 399; Shiphard v. Lutwidge, 8 Ves. 29; Birch v. Glover, 4 Mad. 376.—(*m*) Chaplin v. Chaplin, 3 P. Will. 368; Uvedale v. Uvedale, 3 Atk. 117; Powell v. Robins, 7 Ves. 209; Lechmere v. Brasier, 2 Jac. & Wal. 290; Brookfield v. Bradley, 4 Cond. Cha. Rep. 297.—(*n*) Mallack v. Galton, 3 P. Will. 352; Powel Mortg. 986.

and without hindrance or delay to his creditors, do what it can to save his estate for his benefit. (o) It is, however, certain, that the change of condition of a person who has entered into an agreement by becoming a lunatic, or the death of a debtor and the descent of his estate, which has been incumbered, or is chargeable with the payment of his debts, will not alter the rights of the parties, which will be the same as before; provided they can come at the remedy. (p)

Such was the law of Maryland when, by a British statute, passed the year 1732, and soon after adopted here, lands in this state were made liable to be taken in execution, and sold for the satisfaction of all debts; (q) which, however, did not prevent the parol from demurring. (r) After which, it was, by an act of assembly, declared that any real estate held by an infant, or person *non compos mentis*, might be sold for the satisfaction of the money with which it was chargeable, upon a bill filed in, and by a decree of the Court of Chancery, with the consent of the guardian of the infant, as therein prescribed. (s) And where an action at common law has been brought, in which the title to real estate is involved, which action has abated by the death of either the plaintiff or the defendant, and such title has descended, or been devised to an infant, it is declared that the action shall not be tried during the minority of such infant, unless his guardian, or next friend, shall satisfy the court that it will be for his benefit to have it tried. (t) By another legislative provision, it is made the duty of heirs and devisees of full age, or upon their arrival at the age of twenty-one, in case of a deficiency of personal assets, to pay the debts of their ancestor or devisor out of the real assets, in the same order and manner in which they would have been paid out of the personalty. (u)

But in equity all the real estate of a deceased debtor, whose personal property is not sufficient to pay his debts, is, by positive legislative enactment, made absolutely liable to be immediately sold for that purpose, without delay, notwithstanding its having descended, or been devised, to an infant, or person *non compos mentis*, and that, too, without requiring, as formerly, a conveyance

(o) *Ex parte Philips*, 19 Ves. 123; *Ex parte Hall*, 4 Cond. Cha. Rep. 74; Shelf. Lun. 357.—(p) *Steel v. Alan*, 2 Bos. & Pul. 362; *Pillop v. Sexton*, 3 Bos. & Pul. 550; *Sackvill v. Ayleworth*, 1 Vern. 105; *Owen v. Davies*, 1 Ves. 82.—(q) 5 Geo. 2, ch. 7.—(r) *Lechmere v. Brasier*, 2 Jac. & Wal. 290.—(s) 1773, ch. 7; *Pue v. Dorsey*, 1 Bland, 139, note.—(t) 1785, ch. 80, s. 2; *James v. Boyd*, 1 H. & G. 1.—(u) 1785, ch. 80, s. 7.

from the infant when he comes of age, or allowing him a day to shew cause. The decree, sale, and conveyance by the trustee in pursuance thereof, being made equivalent to a conveyance from such heir or devisee, as of sound mind and full age. (*w*) In case the creditor establishes the claim, and the heir or devisee does not allege and shew a sufficiency of personal estate to pay the debts, this law leaves to the court no discretion whatever; it must decree a sale of so much of the realty as may be sufficient to satisfy the debt for which it has been thus shewn to be liable. This law not only leaves to the court no discretionary power to refuse to sell; but it is strongly indicated, by its terms, that the debt is to be satisfied out of such real assets, without any condition or reservation whatever, according to the full extent of the legal liability of the deceased debtor; that the contract of the creditor is to be, in no respect, embarrassed or impaired, and that he is, without delay, to obtain satisfaction from the real assets of the deceased, in as complete and ample a manner as he could have had against the debtor himself, were he then alive.

I am therefore satisfied, that this first position, as to the discretionary power of the court, upon which these principles in relation to the distribution of the real assets of a deceased debtor have been rested, must altogether fail.

Another position taken in support of these principles, is, upon the general rule in equity, that where a debt is joint and several, the creditor should bring each of the debtors before the court. The reasons for which general rule are, that such debtors are entitled to the assistance of each other in taking the account; that it is necessary to prevent circuitry of action; because the court may decree over as between the defendants according as they may be entitled to contribution in paying the debt; or where one may have paid more than his share; and that if there are different funds, as where the real and personal assets are in the hands of the heir, and executor, who are to that extent both liable, the creditor must make both of them parties, as the personalty must be first applied to the satisfaction of his claim, and the realty only in aid of, and so far as may be necessary to make up the insufficiency of the personal estate. The exceptions to this rule are, *first*, where those of the obligors who have not been made parties are only sureties;

(*w*) *Orchard v. Smith*, ante 318; *Brook v. Smith*, 6 Cond. Cha. Rep. 403; *Kellsall v. Kellsall*, 8 Cond. Cha. Rep. 61; *Powys v. Mansfield*, 9 Cond. Cha. Rep. 445. 1785, ch. 72, s. 5.

secondly, where it plainly appears and is admitted, that nothing has been paid, and that the co-obligor is insolvent; *thirdly*, where it clearly appears and is admitted, that there are no personal assets, the personal representative need not be made a party; and *lastly*, where the creditor had obtained judgment at law against the one of the several obligors who is the defendant in equity, it is not necessary to bring the other obligors before the court, because the bond is drowned in the judgment. (x)

But the cases in which this general rule is laid down, do not profess to declare, that the obligee, on a joint and several bond, may not sue one or both obligors; but that he may, if he pleases, sue one only, or all, as at law. For, if it were not so, there would be no difference in equity betwixt a joint bond, and one joint and several; and if any of the obligors have paid all or a part, the obligor who is sued, or his representative must bring a bill and have it allowed; and it must also lie upon him to compel the other obligors to contribute towards payment of the debt; not upon the creditor who lent his money upon a security that enabled him to sue the obligors severally, if he should think fit; and indeed, if it were otherwise, that which was intended to strengthen the security would tend to hurt it extremely; for the creditor might not be able to find out all who might thus be bound to him; because by the same reason, that all the other obligors themselves must be sued, if any of them were dead, their heirs as well as executors must be made parties; and then, as it would be difficult to commence the suit; so the suit, when commenced, would be subject to continual abatements, which would be a great difficulty on an honest creditor who had fairly lent his money. (y)

But if these principles are to be sustained by any thing to be deduced from this general rule, that all persons interested must be made parties; then it would be indispensably necessary, in every creditor's suit, when a creditor presented a claim, for the satisfaction of which the deceased with others had been bound, that such creditor should be permitted and required, in some way, to make all the co-obligors of the deceased parties to the same case; for

(x) *Jackson v. Rawlins*, 2 Vern. 195; *Galton v. Hancock*, 2 Atk. 436; *Madox v. Jackson*, 3 Atk. 406; *Angerstein v. Clark*, 2 Dick. 738; *Cockburn v. Thompson*, 16 Ves. 326; *Morrice v. The Bank*, Ca. Tem. Tal. 222; *Higgins' Case*, 6 Co. 45; *Bidleson v. Whytel*, 3 Burr. 1548; *Drake v. Mitchell*, 3 East. 258; *Riddle v. Mandeville*, 5 Cran. 330.—(y) *Collins v. Griffith*, 2 P. Will. 313; *Ex parte Rowlandson*, 3 P. Will. 405; *Haywood v. Ovey*, 6 Mad. 113.

otherwise, it would be impossible, or improper, or unsafe, according to the reasons of the principles of the court to decide upon the relative equities of the deceased debtor whose representatives were then before the court and his co-obligors; without compromising the interests of some, or doing gross injustice to the creditor.

Under our system of partible inheritances the difficulties which beset a creditor's bill, by which it is necessary to bring before the court a large family of heirs and devisees of a deceased debtor, together with his executors or administrators, have been found to be so very great, that it has been attempted to remedy the evil by requiring the heir at common law alone to be served with process, and allowing all the others to be called in, by a general publication, and to appear or not as they might think proper. (z) There is, however, no instance to be found in the English books, nor among the records of this court, of a creditor's suit, in which it was ever proposed to make a co-obligor of the deceased debtor a party to the suit. But if, in addition to the family of representatives of the deceased debtor himself, the families of his co-obligors, were, in like manner, allowed, or required to be brought before the court by each of the creditors to whom they were bound, the parties would be innumerable, abatements would be continual, the suit would be interminable, and justice suspended and withheld forever.

This general rule, that all persons interested must be made parties, is, however, made to yield where necessary in the instance either of plaintiffs or defendants; since the rigid enforcement of it would lead to perpetual abatements, and in many cases amount to an absolute denial of justice. In all such cases the rights of the omitted parties are held to be established or bound by the decree; and although, in England, an inconvenience arises, as to the omitted parties, where a specific performance, or a conveyance may be required of all; (a) yet even that difficulty has been, in a great measure, removed by our act of assembly which declares, that in all cases where a decree shall be made for a conveyance, release, or acquittance, and the party shall neglect or refuse to comply therewith, such decree shall stand, be considered, taken, and have the effect of the conveyance, release, or acquittance so ordered. (b)

Hence, as it would be difficult or impracticable, and therefore is

(z) 1797, ch. 114; *Kilty v. Brown*, ante 222.—(a) *London v. Richmond*, 2 Vern. 422; *Meux v. Maltby*, 2 Swan. 284; *Newton v. Egmont*, 6 Cond. Cha. Rep. 346.—(b) 1785, ch. 72, s. 13; 1826, ch. 159.

not necessary to bring all the co-obligors of the deceased before the court; it is manifest, that these principles can derive no support from this rule which requires every one interested to be made parties, to the end that complete justice may be done among all.

But this general rule which requires each debtor, bound by a joint and several obligation to be brought before the court, although it may, to a certain extent, be well founded as to cases where a single creditor sues his living debtors only, or sues one of his joint debtors together with the representatives of another, who is dead, for the recovery of no more than his own particular debt; yet it cannot be applied to a suit, the especial object of which is to have the whole estate of the deceased sold for the payment of his debts; or so much of it as may be necessary for that purpose. A creditor's suit, or a bill which presents a case which requires to be treated as a creditor's suit, does not profess to be a demand of payment by a single creditor for himself alone; but is a call upon the court to cause the assets, real and personal, of a deceased debtor to be accounted for and administered in due course of law for the benefit of all the creditors of the deceased. This is the nature of a creditor's suit according to the English law as well as the law of Maryland; and it is expressly declared by our act of assembly, with an evident reference to a creditor's suit, that the real assets shall be administered by the heir, of full age, in the same order as the personal assets are directed to be applied in payment of debts by an executor; and that all courts of law and equity shall observe the same rules. (c)

It was the course of this court for some time after the establishment of the republic, in a creditor's suit, merely to decree in general terms, that in so far as the deceased debtor's personal estate should be insufficient to pay his debts, his real estate should be sold for that purpose; to appoint a trustee to make the sale, after he had given bond for the faithful discharge of his trust; and to direct him to pay the debts due to the originally suing creditors, whose claims were established by the decree; but, as to all other claims and every other matter, leaving to him the same extent of discretionary authority in the administration of the proceeds of the sale of the real assets as that allowed to an administrator of the personalty; or in other words, giving him the power to dispose of and distribute the proceeds of the sale of the real estate in due

course of law; without requiring them to be brought into court; and without calling on the creditors to file the vouchers of their claims in the chancery office in order to have them passed upon and sanctioned by the court. (d) This course of proceeding was altered about forty years ago, and since that time the proceeds of the sale of the real estate have been always ordered to be brought in; and the creditors called before the court, that the rights of each and the conflicting interests of all might be adjusted by the court itself, and a distribution made among them accordingly.

Hence, it appears from a review of the course of proceeding in this court on creditors' bills, under all the mutations and improvements it has undergone, and from the legislative enactments in relation to the subject, to have always been a settled general principle, that the real assets were to be administered by the heir, or by this court, in like manner as an executor was required to administer the personal assets. But there is no instance, where, in a suit against an executor, either at law or in equity, the suing creditor has been told, that before he could be allowed to obtain a judgment or decree for satisfaction, he must shew that the late

(d) *Bond v. Bond*, ante 353; *Mildred v. Neill*, ante 354.

DORSEY v. COOKE.—This bill, filed on the 24th of November, 1786, very briefly states, that Ambrose Cooke died, indebted to the plaintiff, who brought suit and recovered judgment against his executrix for his debt, when assets should come to hand; that the executrix had paid away the whole of the personal estate of the deceased, who left some real estate; and that the defendant was his heir, and a minor. Upon which it was prayed, that the land might be sold for the payment of the debts of the deceased. The defendant answering by his guardian *ad litem*, admitted the truth of the allegations of the bill.

16th October, 1789.—*HANSON, Chancellor*.—Decreed, that the land be sold for the payment of the just debts of the said Ambrose Cooke, deceased, in due course of administration; that William H. Dorsey be the trustee, &c., to sell the said real estate, or such part thereof, as may be necessary, for the purpose aforesaid; and the manner of his proceeding shall be as follows: he shall first give three months notice in the Baltimore and Georgetown newspapers, and by advertisements set up at the most public places in the county, to the creditors of the said Ambrose Cooke, to bring in to the said trustee their respective claims legally proved. And he shall give six weeks notice in like manner, of the time, place and terms of sale, &c. that the said trustee shall lodge in this court under his hand, with his affidavit of the truth thereof annexed, a just and accurate account of the sales, specifying to whom made, with the time and price; and specifying also, his disbursements, payments and applications of the money; and the said trustee shall apply of the produce of the sale, such part as may be necessary to the discharge of the just claims of the creditors of the said Ambrose Cooke, in due course of administration, after deducting thence all the legal costs of this suit, and his just expenses, and commission of five per cent. allowed hereby to himself, &c.—*Chancery Proceedings*, lib. S. H. H. lctt. B. fol. 711.

obligor was the principal debtor ; or if a surety, that his principal or co-surety, was insolvent ; and yet, if the principles of this court be correct, they should certainly be as fully applicable in a suit at law or in equity against a personal representative, as in a suit against the heir or holder of the realty. Consequently, it is evident, that these principles of this court, are incompatible with the spirit, if not the very letter of our legislative enactments, and with the general tenor of those rules, according to which the assets of a deceased debtor are administered in every other court.

A third ground assumed in those decisions of my predecessors, is, that where the debt appears to have been contracted by the deceased, jointly with another who is solvent, the court should refuse to suffer the creditor to have an infant's estate sold ; because such a creditor has or had it in his power, since the ancestor's or devisor's death, to recover the whole claim from the other debtor.

In considering this position, it will be necessary to recollect, that it was originally and has always been applied to cases of mere personal transitory contracts, by which two or more are bound by the terms of the contract for the payment of money. It has not been exclusively applied to those cases where the creditor had received from his debtor a pledge or pawn of property, which he stipulated to have appropriated to the satisfaction of his claim in the first instance, before he made any personal demand upon his debtor ; nor has it been confined to those cases in which the creditor had accepted from his debtor an assignment of a bond, note, or *chose in action*, as a conditional payment, where, by the terms of the contract, the creditor is bound to use due diligence, in order to make the means of satisfaction, so placed in his hands, available ; or excuse himself by shewing, that the pawn has been found insufficient, or that the debtors bound by such assigned *chose in action*, are insolvent, and that he has actually returned, or is, and has always been able and ready to return the *chose in action* so assigned. It cannot be denied, that the principles of the court so far as they have a direct bearing upon such cases as these, are sustainable by the clearest reason and equity ; and indeed, have been enforced in courts of common law as well as in this court. (e)

(e) Kearslake v. Morgan, 5 T. R. 513 ; Clark v. Young, 1 Cran. 181 ; Harris v. Johnston, 3 Cran. 311 ; Powel Mortg. 1083 ; Hoffman v. Johnson, 1 Bland, 103 ; Dorsey v. Campbell, 1 Bland, 356.

This third position, taken in support of the principles of this court, rests upon the general doctrine in relation to principal debtor and surety. It is alleged, that the creditor must be excluded from any participation in the deceased's estate; because he had it in his power to recover his whole claim, or a due proportion of it, from the principal debtor, or the other sureties; or because he is chargeable with some injurious negligence as regards the deceased debtor, whose estate the court is then about to distribute. And assuming these allegations to be true, until the contrary is shewn, the court calls upon the creditor to explain the transaction, and to shew which of the obligors is the principal, and which the surety.

In the common case of a money bond, there is no distinction upon the face of it, between the principal and surety; nor is it necessary to be shewn in any suit upon such a bond, who is principal and who is surety; except for the purpose of administering the equities that arise between the principal and sureties. Such an instrument shews only, that the creditor has parted with his property, or lent his money on a security, by which two persons are jointly and severally bound to him. The contract is legal and fair; and therefore, as to him, they are both principal debtors; though with respect to each other, they may stand in the relation of principal and surety. Of the interests or motives between them, the creditor has, or need have no knowledge. All he looked to was a security, by which two persons were equally and jointly bound to him; and that his security had an admitted legal obligatory force fully to that extent. And if the bond were joint only, still as against other creditors even, and in the administration of assets, it would be allowed to have the effect of a several bond. (*f*) Yet, according to these principles of this court, the creditor must not only know which of the obligors is the principal debtor, and which the surety, but may have the burthen cast upon him of developing by proof, the latent circumstances of the contract itself; and of shewing that the other obligors, who were bound with the deceased, are insolvent. Thus assuming, as established matters of fact, until the contrary is shewn, that the deceased was a surety only; that the principal debtor, and all the other obligors, are well able to pay on demand; and that the creditor, knowing all this, is making an unjust attempt to oppress the representatives of the

(*f*) *Burn v. Burn*, 3 Ves. 574; Just. Inst. by Coop. 613.

deceased; or to obtain satisfaction from his estate, to the prejudice of his other creditors.

The assumption of the truth of these allegations, and throwing the burthen of proving the contrary upon the creditor, is manifestly at variance with that equity by which all other analogous cases between debtor and creditor is grounded. It is laid down, in all such cases, that he, whether he be in reality principal or surety, on whom the creditor calls, must pay; and that the holder of the security may lay hold of the surety even in circumstances under which the surety may not have the same benefit that the creditor had. (*g*) With the exception only of those cases where there is no risk, delay, or expense, as where the money is in the next room, or where the surety indemnifies the creditor, or deposits the money, and undertakes, that he shall be at no expense, then the creditor may be compelled to do what he can for the benefit of the surety. (*h*) And this is the rule of the civil law; (*i*) and the same principles have been distinctly recognized by the provisions of our act of assembly, which, as declaratory of the common law, give to the surety a right to have the benefit of the security, which he has satisfied, to enable him to take the place of the creditor, and proceed against the principal debtor. (*j*)

The claim of the creditor can, in no way, be suspended, or put in peril, at the instance of a surety. But if the debt be fully paid by the surety; for the payment of a part will not give him a right to an assignment of the security, (*k*) then those equities arise, which apply as between principal and surety, and between two or more sureties, as regards the contribution they owe to him who has paid the whole; or in relief of each, so that the burthen may be borne equally, or in the proportions warranted by the terms of the contract. And in such cases, where the parties are before the court, after awarding to the creditor full satisfaction as against all and each of his debtors, it will adjust these equities, without prejudice to him, and, by a decree over, direct that the principal shall be first made to pay, if able, and if not, then that each one of his sureties shall be compelled to contribute his due proportion. (*l*)

(*g*) Cary's Rep. 17.—(*h*) *Ex parte* Wildman, 1 Atk. 110; *Galton v. Hancock*, 2 Atk. 435; *Wright v. Simpson*, 6 Ves. 734; *Ex parte* Kendall, 17 Ves. 519; *Union Bank v. Laird*, 2 Wheat. 390.—(*i*) *Kames' Pri. Eq. b. 1*, p. 1, ch. 3, s. 1.—(*j*) 1763, ch. 23, s. 7 and 8; *Lenox v. Prout*, 3 Wheat. 520.—(*k*) *Ex parte* Rushforth, 10 Ves. 420; *Hollingsworth v. Floyd*, 2 H. & G. 91.—(*l*) *Cooke v. —*, 2 Freem. 97; *Fleewood v. Charnock, Nelson*, 10; *Parsons v. Briddock*, 2 Vern. 608; *O'Carroll's*

The insolvency of the principal is, in no instance, necessary to be shewn; except where a surety alone claims contribution from his co-surety, and the principal is not a party to the case. (*m*)

But if the creditor has done any act injurious to the security, or has omitted to do that which, by the nature of his contract, he was bound to do, such acts or omissions give to the surety a clear release from his obligation. It must, however, appear to have been the act of the creditor himself, and that his conduct had been directed by his own will, with a knowledge of his rights, and not that it was the result of mere accident or mistake. For there are many cases where equity will set up debts extinguished at law against a surety, as well as against a principal, as where a bond has been destroyed or cancelled by accident or mistake, or caused to be delivered up by fraud; because a surety cannot be allowed to benefit by mere accident or mistake, or to avail himself of the fraud of any one. (*n*) But where any act has been done by the creditor that may injure the surety, or that alters his situation, it may be turned to his advantage; (*o*) as where the principal had left a sufficient fund in the hands of the creditor, and he thought fit, instead of retaining it, to pay it back to the principal; (*p*) or where the creditor made a compromise with the principal debtor, and accepted a part of the debt in satisfaction of the whole from him without a clear or express reservation of the creditor's remedies against the surety, and of the surety's right to take the place of the creditor, (*q*) or where the creditor, by positive contract, enlarged the time of payment, even because of the principal debtor's being then unable to pay; or where the creditor expressly stipulated, that he would not sue the principal within a certain time after the debt had become due, so that the surety could not come into equity by a bill *quia timet*, and have the bond put in suit; (*r*) or, by paying the debt, have an assignment of the security, so as to enable him immediately to proceed against the principal, or have the same remedy against the principal as the

Case, Amb. 61; *Peter v. Rich*, 1 Rep. Cha. 34; *Collins v. Griffith*, 2 P. Will. 313; *Tynt v. Tynt*, 2 P. Will. 542; *Dering v. Winchelsea*, 1 Cox, 318; S. C. 2 Bos. & Pul. 270; *Wright v. Morley*, 11 Ves. 22; *Craythorne v. Swinburne*, 14 Ves. 160; *Mayhew v. Crickett*, 2 Swan, 186; *Smith v. Tunno*, 1 McCord, 443; *Lowndes v. Chisolm*, 2 McCord, 455.—(*m*) *Lawson v. Wright*, 1 Cox, 276.—(*n*) *Skip v. Huey*, 3 Atk. 93.—(*o*) *Eyre v. Bartrop*, 3 Mad. 221; *Rathbone v. Warren*, 10 John. 587.—(*p*) *Law v. The East India Company*, 4 Ves. 824.—(*q*) *Ex parte Gifford*, 6 Ves. 805; *Boulton v. Stubbins*, 18 Ves. 20.—(*r*) *Baker v. Shelbury*, 1 Cha. Ca. 70; *Renelaugh v. Hayes*, 1 Vern. 190.

creditor could have had on the original contract, the surety will be totally discharged; upon the ground that all such acts are against the faith of the contract, by virtue of which the surety had precisely the same right the creditor had, and must be allowed to take his place in all respects; and also upon the principle that the creditor is a trustee of his security, that is, of the bond, suit, execution, &c. for all parties interested in it, or who may ultimately resort to it for relief. (s) And so, too, if the creditor omits to do that which the nature of his contract requires him to do, as if, being the holder of a negotiable instrument, he fails to give notice of its non-payment to the drawer and endorsers, they, as sureties, will be completely discharged. (t)

The sole ground of relief to a surety, as exemplified by these various instances at law and in equity, is, that he has, by the act or omission of the creditor, been deprived of a legal or equitable remedy for relieving himself, or that such remedy has been impaired. (u) But it is distinctly avowed, that the principles under consideration, are not founded on any such acts or omissions of the creditor; but simply on a presumption of the truth of certain facts, from which mere *passive* negligence is inferred, and which may be applied alike, and with equal propriety, to all contracts to which there is, in fact, a principal and surety. And consequently, they can derive no support from any thing to be found in this branch of the doctrine upon the subject of principal and surety.

A creditor, however, is not bound to active diligence against the principal debtor; the surety is a guarantee; and it is his business to see that the principal pays, and not the creditor's; and therefore, mere passive delay has never been held to discharge the surety. This principle, in relation to the liability of a surety, seems to have received the unqualified approbation, not only of the Court of Appeals of this state; but of every other enlightened

(s) *Parsons v. Briddock*, 2 Vern. 608; *Nisbet v. Smith*, 2 Bro. C. C. 579; *Rees v. Berrington*, 2 Ves. jun. 540; *Wright v. Morley*, 11 Ves. 22; *Boulton v. Stubbins*, 13 Ves. 20; *Samuell v. Howarth*, 3 Meriv. 272; *Robinson v. Wilson*, 2 Mad. Rep. 434; *Mayhew v. Crickett*, 2 Swan, 190; *Gould v. Robson*, 8 East, 576; *Clarke v. Devlin*, 3 Bos. & Pul. 363; *Hill v. Bull*, Gilmer, 149; *Bennett v. Maule*, Gilmer, 305; *Ward v. Johnson*, 6 Mun. 6; *Hollingsworth v. Floyd*, 2 H. & G. 90.—(t) *Ex parte Smith*, 3 Bro. C. C. 1; *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652; *English v. Darley*, 2 Bos. & Pul. 61; *Lenox v. Prout*, 3 Wheat. 520.—(u) *Buchanan v. Bordley*, 4 H. & McH. 41; *Norris v. Crummey*, 2 Rand. 323; *Hampton v. Levy*, 1 McCord, 107; *Galphin v. McKinney*, 1 McCord, 280.

tribunal by whom the subject has been considered; (*w*) and yet, according to these principles, now under examination, in direct opposition to a rule of equity thus universally sanctioned, it is assumed, even *ex officio*, as a fact, that the creditor has been negligent; and that such his mere passive *laches*, is a sufficient ground for refusing to allow him to obtain satisfaction from the deceased's estate, unless he can prove, that the deceased was the principal debtor, or that the other obligors are insolvent.

Perhaps it may be supposed, that these principles of the court may derive some countenance from the equity upon which securities, or assets are marshalled; as where a creditor has his debt secured by a lien or mortgage upon two funds, and another has an interest in only one of the funds, he may compel the one whose debt is secured by both, to resort to the other, so far as it may be necessary, to satisfy both claims. (*x*) And where there are two different sets of parties, and one set may resort to both funds, and the other only to one, the party who may have recourse to both, may be compelled to resort to the one fund, which cannot be reached by the other, so as to leave enough for both. (*y*)

This equity is, however, never administered *ex officio*, nor at the suit of the debtor, but only at the instance of one creditor against another; by which the debtor may nevertheless, indirectly derive benefit. But the securities or assets can never be marshalled to the prejudice of the creditor; or so as to suspend or put in peril his claim; or upon any other terms than giving him entire satisfaction. For in making this arrangement, the court cannot lessen his security or vary his contract; except so far as waiting a short time to ascertain the value of the estates, can be considered as having that effect. The creditor who calls for it, must shew that the right of his co-creditor will neither be endangered nor injuriously delayed; for if he fails to do so, he can have no other benefit than a subrogation of his right, or the being allowed to stand in his place.

Hence it is evident, that these principles of the court, can derive no support from the doctrine of marshalling securities or assets.

(*w*) *Heath v. Percival*, 1 P. Will. 682; *Wright v. Simpson*, 6 Ves. 734; *Samuell v. Howarth*, 3 Meriv. 272; *The Trent Navigation Company v. Harley*, 10 East. 34; *Deming v. Norton*, Kirby Rep. 397; *King v. Baldwin*, 17 John. 384; *The Commonwealth v. Wolbert*, 6 Binn. 293; *Buchanan v. Bordley*, 4 H. & McH. 41; *Croughton v. Duval*, 3 Call. 70; *Hampton v. Levy*, 1 McCord, 107; *Galphin v. McKinney*, 1 McCord, 297.—(*x*) 1 Mad. Chan. 250.—(*y*) 1 Mad. Chan. 615.

Some suggestions in favour of these principles may, perhaps, be expected to be found in the rules by which cases of bankruptcy are governed. A bankrupt, when contemplated as a really insolvent debtor, whose effects are about to be distributed among his creditors, may be considered as presenting a state of things strikingly analogous to that of a deceased debtor, whose estate is to be applied in satisfaction of his debts, in due course of administration.

It is a rule of equity, in cases of bankruptcy, deduced from the general principles of the statutes by which the subject is regulated, that no creditor shall be admitted to come in under the commission, so as to obtain more than a rateable dividend, without regard to his security. Hence, when a creditor applies to prove his claim under the commission, he may be called on, in most cases, to deliver up his security, so that the other creditors may have the benefit of the means of satisfaction he has chosen to abandon. If there be a mortgage of the bankrupt's estate, the mortgagee may have the mortgaged property sold, and the proceeds, after deducting all costs and expenses of sale, applied in satisfaction of his claim as far as it will go, and then come in under the commission for the balance. In short, wherever the creditor holds a double security, he may make choice of either, or pursue both, so he does not obtain a double satisfaction. If he obtains a partial satisfaction by one security, he is allowed to prove against the estate of the bankrupt only, for the balance; and if he comes against the bankrupt for the whole, his claim upon the other security is satisfied, or diminished by so much as he receives from the bankrupt's estate. If the bankrupt be the principal debtor, his surety from whom the creditor may have obtained a partial or a full satisfaction, takes the place of the creditor to that amount. And if the bankrupt be only a surety, then his assignees have a right to be subrogated to the creditor's place, in so far as satisfaction may have been made from the bankrupt's estate for the benefit of his other creditors. (z)

If these regulations on the subject of bankruptcy, should be deemed applicable to the case of a deceased debtor's estate, about

(z) *Ex parte* Ryswicke, 2 P. Will. 89; *Ex parte* Lefebvre, 2 P. Will. 407; *Ex parte* Rowlandson, 3 P. Will. 405; *Ex parte* Grove, 1 Atk. 104; *Ex parte* Marshal, 1 Atk. 130; *Ex parte* Bennet, 2 Atk. 528; Order of Court, 4 Bro. C. C. 550; *Ex parte* Goodman, 3 Mad. 373.

to be administered under a creditor's suit, they would clearly suggest the propriety of allowing each creditor to come in at once, according to the terms of his contract, for the whole amount of his claim then due; and of calling on him when so satisfied, to assign his securities to the suing creditors, to the heir, or devisee, or to the executor or administrator, or to suffer them to take his place for so much as he had been satisfied for their own benefit or for that of the legatees or next of kin of the deceased.

But the principles of this court are essentially different. In bankruptcy, the creditor himself makes choice of the security, from which he will obtain satisfaction, and the court, so far from lessening the obligation of any of his securities, or driving him from any one of them, will assist him in enforcing his contract to the extent of its jurisdiction, so as to insure to him one complete satisfaction; but here, the court officiously interferes, and throws upon the creditor the burthen of shewing whether the deceased was principal or surety, or co-surety; and then, unless he also proves, that the co-surety or principal debtor, is insolvent, directly contrary to the principles which prevail in bankruptcy, pushes the creditor partially or entirely away from that portion of his security by which the deceased's estate might have been made liable. (a)

The doctrines of bankruptcy sustains the obligations of the creditor's contract in all its bearings; the principles of this court strike off a large proportion of its force on the very eve of fruition, and at the moment when the means of a full or partial satisfaction are shown to be immediately at hand. It is evident, therefore, that nothing can be found to sustain these principles of this court in any of the rules applicable to cases of bankruptcy.

It might perhaps, have been urged, that the peculiar circumstances under which the rights of a creditor, and the liabilities of his debtor are presented in a creditor's suit, calling for the administration of the real assets of such deceased debtor, render it necessary to depart from those rules so clearly applicable in a different state of things, and require the adoption of these principles of this court, in order to do equal justice to all whose interests have been brought into conflict by the death of the debtor.

It is certain, however, that the mere act of God, as the death of the debtor, does not change the rights of the creditor; nor can they be affected by any change, from that cause, in the mental

(a) *Ex parte* Kendall, 17 Ves. 519.

capacity of the debtor, as by his becoming a lunatic. (b) And it is also settled, that no alteration in the civil, political, or pecuniary condition of the debtor can authorize a court of justice to fetter or abolish any of the creditor's remedies arising out of the personal liability of his debtor, either by confining the creditor to a particular fund; or altogether to the person of the debtor; or by compelling him to seek satisfaction of any one alone, where two or more have been made liable by the nature of the contract. (c)

As where, in England, the debtor had been attainted of felony, whereby all his property had become forfeited; or where he had become a bankrupt, without a certificate, and had his whole estate put into the hands of his assignees; or where by a special act of the legislature all his estate had been vested in trustees for particular purposes; or where the estate of a British subject had, by an act of assembly of one of the states of our Union, been confiscated; such circumstances were not allowed, in any manner, to impair the obligation of the contract, to diminish the rights of the creditor, or to lessen the liability of the debtor, even although it should clearly appear, that the surety could not have the security assigned to him; or that it would be impossible for him to take the place of the creditor in any respect whatever. A court of equity cannot interpose to enlarge the effect of a legal contract, nor can it be called upon to cut down its then subsisting legal operation. Because, even as in the case of an attainder, according to the law of England, by which the debtor is civilly dead, and all his property forfeited, the law implies from such a contract, that the creditor can charge his debtor's person in execution; and even in circumstances from which there appears to be no ray of hope of getting any thing by it, the creditor has a right to take his chance of that; the court has no right to judge for him what he can make out of the imprisonment of his debtor, operating by way of duress upon the feelings and affections of third persons; or as it is expressed in an ancient English statute, 'until he have made agreement, or his friends for him.' Because it is the contract of the parties, and the court has no right to apply the terms, 'wilful, malicious, and oppressive,' to what the law under those circumstances allows. Such are the doctrines of the English Court of Chancery, by which it appears, that no hardships or sufferings, however

(b) *Owen v. Davies*, 1 Ves. 82.—(c) *Jennings v. Elster*, 7 Cond. Cha. Rep. 115; *Wilkinson v. Henderson*, 7 Cond. Cha. Rep. 173.

extreme, are permitted to shake or impugn the sacred obligation of contracts as between debtor and creditor. (*d*)

These rigid and inflexible principles of the English code have always been considered as forming a part of the law of Maryland; and have been approved and affirmed by the highest authority of our country. The case of the British subject, whose whole property in this country, where the debt had been contracted, had been seized, and confiscated with a reservation in favour of his just creditors, presented an apparently irresistible claim on the part of the debtor for relief, so far as to compel the creditor to seek satisfaction, in the first instance, from the confiscated estate of his debtor; yet after the most mature consideration it was finally held in England, that even such a case would not warrant a court of justice in giving such relief to the debtor as would, in effect, impair the obligation of the contract. (*e*)

By the constitution of the United States, it is declared, that 'no state shall pass any law impairing the obligation of contracts.' (*f*) Of the history or causes of this restriction upon the legislative power of the states, it is unnecessary here to say any thing; nor is it necessary to speak of the kind of legislative enactments to which it properly applies. It is sufficient, as regards the subject under consideration, that the people, or sovereign authority of this country, has deemed the obligation of contracts, at least as between individuals, creditor and debtor, as a matter so important and so sacred as to be guarded by an express provision of constitutional law, unalterable even by the government itself. Now if, as it is thus declared, the legislative department cannot, by any of its acts, impair the obligation of contracts, it surely could not be allowed, that the judicial department should effect the same thing by means of any judgment or decree. The judicial department applies to particular cases only such rules as the legislature may lay down; but the legislature is prohibited from laying down any such rules, and therefore no such rules can be applied by the judicial department.

Hence, any principles, such as these now under consideration, the effect of which is to impair the obligation of a contract, which

(*d*) Stat. Acton Burnel, 11 Ed. 1; Kilty's Rep. 143; Holditch *v.* Mist, 1 P. Will. 695; Wright *v.* Simpson, 6 Ves. 714; Folliot *v.* Ogden, 1 H. Blac. 123; Wright *v.* Nutt, 1 H. Blac. 136; Kempe *v.* Antill, 2 Bro. C. C. 11; Wright *v.* Nutt, 3 Bro. C. C. 326; *Ex parte* Kendall, 17 Ves. 520; 12 Westminster Review, 369.—(*e*) Wright *v.* Simpson, 6 Ves. 714.—(*f*) Art. 1, s. 10.

the legislature is prohibited from declaring to be rules of law, the judiciary cannot assume and apply, as such. These principles of this court, by which a creditor is prevented from obtaining satisfaction from the estate of his deceased debtor, in certain cases, where others have been bound for the payment of the same debt, it is evident, do, in effect, deprive the creditor of at least a part, and very often of the whole of his security; they do most manifestly, in a material and essential manner, impair the obligation of the contract; and are, therefore, in direct hostility with the general principles of our code as taken from that of England, and with the spirit, if not the very letter of this provision of the constitution of the United States.

But according to these principles the creditor, it is obvious, from the very nature of things, may not merely have his security materially cut down and grievously impaired, but altogether destroyed. The explanation whether the deceased is principal or surety, and the proof of insolvency is almost always the occasion of embarrassment and delay. Notwithstanding which it is declared, that the claims having been then barred by the statute of limitation, as against others, forms of itself no ground for letting the creditor in to obtain any satisfaction from the estate of the deceased. And if it should not be barred by limitation, still the attempt to recover satisfaction from the other joint debtors may fail, from a variety of causes, against which no diligence of the creditor can guard. The other debtors may be in desperate and rapidly sinking circumstances although then not reputed to be insolvent. They may be residents of other states, or remote places, from which it may be difficult or impossible to obtain correct information as to their pecuniary condition; or they may be dead and their representatives so numerous and dispersed as that the creditor may find it impracticable within any reasonable time, to procure any kind of proof of their insolvent condition.

Upon the whole, I have been long satisfied, that these principles of this court in relation to the distribution of the real assets of deceased debtors operate hardly, injuriously, and perniciously upon the rights and interests of creditors. Yet as it appears, that they have been steadily continued in full force for more than thirty years past; and as I found them firmly rooted and in full vigour when I came here, I shall therefore continue to acquiesce under their operation; leaving it to other and higher authority to correct the evil, if it should be so considered, in such manner as may be deemed most proper.

Two of these excepting creditors, however, contend that, although these principles of this court may be established, they do not apply to their cases as the holders of promissory notes which had been endorsed by the deceased; because every endorser of such an instrument being considered as an original maker or acceptor, and chargeable as such, he is not merely a surety, but must be treated as an original debtor for the whole amount. This is certainly the law in relation to such a contract; but it is not the whole law as regards the matter under consideration.

The holder of a promissory note, or bill of exchange, which has come to his hands through several endorsements, has a double security; and it is a rule of law and equity, that a man may make use of all the securities he has, until he receives satisfaction for his whole debt. And, therefore, as to the holder, the maker, acceptor, drawer, and each endorser is, as a distinct debtor, liable for the whole amount, and each one may be sued separately as such, at the same time; but the court will not allow the holder to obtain more than one entire satisfaction. It is clear, that, as regards the holder, they all stand as principal debtors; but, in point of fact and law, the several endorsers are warranters of the note or bill, and although they may not be strictly sureties, (g) who stand in the relation to each other of co-obligors in a joint and several bond, entitled to contribution from each other on the failure of their principal; yet they are, in truth, sureties standing as a series of guarantees, all of whom pledge themselves for the sufficiency of the maker or acceptor, and each one responsible for all who stand before him. The primary liability resting upon the maker or acceptor, and the drawer and each endorser liable only in a secondary degree. Considered as sureties to this extent, and in this order, all the doctrine respecting principal and surety applies to their relative situation, except as regards contribution; in place of which, each endorser, on taking up the note or bill, has a right to stand as a creditor against every one before him as his debtor to the full amount of the note or bill; but a prior endorser can have no claim upon a subsequent endorser. (h)

Hence, it is clear, that these principles of this court apply as

(g) *Ex parte Yonge*, 3 Ves. & Bea. 39.—(h) *Ex parte Wyldman*, 2 Ves. 115; *Ex parte Marshal*, 1 Atk. 130; *Tindal v. Brown*, 1 T. R. 167; *Smith v. Woodcock*, 4 T. R. 691; *Stock v. Mawson*, 1 Bos. & Pul. 286; *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652; *English v. Darley*, 2 Bos. & Pul. 61; *Clarke v. Devlin*, 3 Bos. & Pul. 363; *Gould v. Robson*, 8 East, 576; *Wood v. Repold*, 3 H. & J. 125.

strongly to a case of this kind in favour of a drawer or endorser, as to the case of a common money bond, where the deceased was bound as one of the obligors, and was, in fact, only a surety.

Considering these rules as established, and as applicable to this case, the next inquiry is as to the kind of proof which may be received and deemed sufficient in cases of this description, in explanation of the nature of the contract, and as to the insolvency of any of the obligors; that is, whether the deceased, whose estate the court is about to administer, was principal or surety; or, if a surety, then whether the principal or co-surety be insolvent or not.

It is well settled, as between principal and surety, that parol proof may be admitted to shew, that, by a written contract, according to the literal terms of which, two or more are equally bound as principals, the one is, in fact, a principal, and the others no more than mere sureties; because such proof does not purport to interpret or expound the written instrument, but merely to establish a circumstance connected with the contract in relation to which the writing did not profess to speak. (i)

The fact of insolvency is, from its peculiar nature, involved in much obscurity. The equity on which a surety claims contribution of his co-surety, is founded upon the fact of the principal being really in a condition of insolvency; not on the mere circumstance of his having been declared a bankrupt, or having applied for the benefit of the insolvent laws. A man, according to the English law, may have been declared a bankrupt, and yet be able to pay thirty shillings in the pound; and so too, in this state, a person may have been driven, or indeed, from sinister motives, induced to apply for the benefit of the insolvent laws, and yet be not in a condition of insolvency. But it is that actual condition alone of the principal or co-surety, without regard to any movement under the insolvent laws, which, according to these principles of this court, can authorize the creditor to claim satisfaction from the deceased surety's estate. A man, while he carries on trade, or has any business that affords him a prospect of gain, is not an insolvent, though his effects may not be sufficient to pay his debts; for he has it in view to pay all, and may be enabled to do so. But if his business fails, and leaves him no prospect of paying his debts, he is then, in the common sense of mankind, insol-

(i) *Craythorne v. Swinburne*, 14 Ves. 170; *Smith v. Tunno*, 1 McCord, 451.

vent ; because he is in that condition in which his creditors must lose by him (j)

A release, provisional or final, under the bankrupt or insolvent laws, furnishes at least, *prima facie* evidence of this condition of insolvency which gives to the creditor a right to demand satisfaction from the estate of the surety ; and to one surety to claim contribution from his co-surety. It has been said, however, that in the absence of such proof as this, the creditor must shew, that he has brought suit against the principal, and has been unable, by execution, to extract satisfaction from him. The return of *nulla bona*, however, to a *fieri facias*, proves no more than that the sheriff, if he has done his duty, has been unable to find any property of the defendant within his county ; and yet the defendant may be wealthy, and have a large amount of property elsewhere ; or of a kind not within reach of the *fieri facias*. (k) But if proof of this description were required, then, as it is of a kind which the creditor can only put together and create by due course of law, it would seem to follow as a necessary consequence, that he should be allowed time thus to fabricate it. If so, it would be enough, at least, for this purpose, that he should bring his suit before his claim had been barred by the statute of limitations ; and that may be when he files his claim in this court. There may be, and often are, many creditors whose claims are founded on joint and several obligations ; and which will, therefore, require some proof. Now if the final distribution of the deceased's estate were to be suspended until full proof of this kind, by judgment and execution, could be fabricated ; the delays might be almost interminable. Proof of this description, however, where it actually exists, shewing a failure to obtain satisfaction by an execution, running over a county where the debtor resides, or within which, if at all, he must be presumed to have some property, may be received as sufficient *prima facie* evidence of insolvency, to found the creditor's claim upon the deceased's estate ; but such proof never has been, nor ever ought to be held to be indispensably necessary. (l)

In the great majority of cases it would be impracticable, or exceedingly tedious and expensive, to procure any other proof of insolvency, than that of general reputation in that part of the country where the debtor resides, and is known. Where the debtor

(j) Kames' Pri. Eq. b. 3. c. 5.—(k) Goodall v. Stuart, 2 Hen. & Mun. 105.—
(l) Spurrier v. Spurrier, 1 Bland, 476.

was a merchant, proof of his having suffered his notes to be protested for non-payment, with other circumstances, have been deemed sufficient. As where it was proved, that the maker of the note was in bad circumstances, and was supposed and reputed to be insolvent; and that he had left his usual place of residence sometime before, and had not returned to it; such proof was considered as sufficient evidence of a known insolvency. And so in this court, proof of insolvency by general reputation, has been deemed sufficient. But in a creditor's suit, it has been held to be enough, as in this instance, to produce *ex parte* affidavits to that effect; unless the fact be controverted, and full proof thereof should be expressly required by a creditor or party, when it must be proved according to the regular course of the court. (*m*)

(*m*) *Fladong v. Winter*, 19 Ves. 196; *Clark v. Young*, 1 Cran. 181; *Brown v. Ross*, 6 Mun. 391.

EMORY v. SETH.—This was a creditor's bill, filed on the 27th of March, 1806, stating that the late Thomas J. Seth was indebted to the plaintiff; that the personal estate of the deceased was insufficient to pay his debts; that the defendants were his heirs; that he left real estate; and praying that it might be sold, &c. Upon the answers coming in, the case was submitted, and a decree was passed in the usual form, that the real estate be sold; which was sold accordingly.

The auditor in his report, made on the 1st of May, 1813, among other things, stated that account No. 14, was a claim of Marmaduke Tilden and wife, which originated under the will of John Costin, father of the said Ann, by which a share of his personal estate was bequeathed to her. That this claim, to the amount stated in the account current referred to, appeared to be well established against Charlotte Clayland, executrix of Jacob Clayland, who was administrator *de bonis non cum testamento annexo*, of the said John Costin, by a judgment rendered therefor in Queen Anne's County Court, of which judgment, a short copy was exhibited with the usual proof; that the securities of the said Charlotte Clayland, in her administration bond, were James Clayland, Sr. and Thomas J. Seth, the deceased ancestor of these defendants. And affidavits of the insolvency of Charlotte; and a certificate of James Clayland's discharge under the insolvent laws, were exhibited. But it did not appear that a *feri facias* had ever been issued on the said judgment against the said Charlotte, as executrix, or that *nulla bona* was returned; or that any proceeding had ever been had upon her bond; nor was there any authentic certificate of her discharge under the insolvent law.

In the notes of the solicitor of this claimant, it was said, that the auditor had rested his objection as to the necessity of the return of *nulla bona*, on the act of 1720, ch. 24, which was wholly inapplicable to the case; and that proofs, by affidavits alone, of the insolvency of the principal, were amply sufficient to entitle the claimant to obtain payment from the estate of the surety; and that what was sufficient proof of insolvency, was in all cases, a matter of sound discretion with the court; and was not necessary to be shewn, either by a return of *nulla bona*, or by a certificate of a legal discharge under the insolvent laws.

26th July, 1813.—**KILTY, Chancellor.**—Ordered, that the claim of M. Tilden and wife, No. 14, be allowed, and paid as other claims, by the order of 22d June, 1813.

I am therefore of opinion, that these affidavits of *John W. Duvall*, and *Robert Welch*, of *Ben.*, must in this case be received as sufficient evidence of the insolvency of the makers of the notes which were endorsed by the deceased.

It appears from the vouchers of the claims, as referred to by the auditor, that the deceased, *Beale M. Worthington*, had, in his life-time, given a single bill to *Warfield & Ridgely*, No. 39, for the payment of a certain sum of money; and was, besides, indebted to the same firm, on an open account, No. 42; and further, that he had given his single bill, No. 40, for the payment of a sum of money to *David Ridgely & Co.*; and was indebted to them by an open account, No. 41; and that all four of these claims have been assigned by the surviving partner of those firms, to the present claimant, *George Wells*. It also appears, that the same firms had become liable to the deceased as the endorser of certain promissory notes, the holders of which, now claim satisfaction from his estate.

It is perfectly clear, that if those firms of *Warfield & Ridgely*, and *David Ridgely & Co.*, had themselves, claimed payment of the four debts they assigned to *Wells*, that the deceased in his life-time, might have set off, or had a discount in bar of so much as he had been compelled to pay as endorser for those firms. And this same right of the deceased, now subsists for the benefit of his representatives; unless it can be shewn that the assignee of those debts, stands in a better situation than those firms under whom he claims. But it is a well established general rule of this court, that the assignee of a *chose in action*, except negotiable paper, such as a note or bill of exchange not then due, takes it subject to all the equity it was liable to, in the hands of the obligee or original creditor, whether the assignee had notice at the time, of such equity or not. Length of time and circumstances, may however, vary the rule and strengthen the claims of the assignee. (n) But in this instance, there is no single circumstance which can give this assignee any claim to a modification of the rule in his favour. It must, therefore, be applied to this case as fully as suggested by the auditor; and if it shall appear, that his claims are more than covered by the endorsements for which the deceased's estate is liable, they must be rejected altogether; otherwise he may be allowed to come in for the balance.

(n) *Coles v. Jones*, 2 Vern. 692; *Hill v. Caillovel*, 1 Ves. 122; *Priddy v. Rose*, 3 Meriv. 86.

It is sufficiently obvious, upon general principles, in a creditor's suit to administer the assets of a deceased person, that no debt can be allowed and paid out of such assets, which was not contracted by, or due from him, during his life-time; and it has been distinctly so settled by this court, and by the Court of Appeals. (o) The claim of *A. & J. Miller*, assignees of *James Taylor*, designated by the auditor as No. 44, which appears to have been a debt contracted since the death of *Beale M. Worthington*, must therefore be rejected.

When I came here, I found many instances of creditor's bills against the heirs of the deceased debtor alone, without making his executor or administrator a party; indeed, it seemed to have been considered by many as the correct course of the court. (p) It was evidently attended with inconvenience, as is exemplified in this case. But by a decision of the court of the last resort, reported and published since this bill was filed, and only a short time before this decree for a sale was passed; it has been finally and correctly settled, as a general rule, that the personal representative, as well as the heirs and devisees, must always be made a party. (q) Here the administrator has not been made a party, and on that account, this decree might have been withheld or reversed, had the objection been made in time.

It appears, from the report of the auditor, that there are some personal assets to be distributed. It is certain, that those assets must be first administered in due course of law, and then what remains due, after they have been exhausted, must be paid from the real assets, so far as they will go, to those who have not been satisfied in due proportion, or whose claims have been unjustly rejected by the administrator.

Whereupon it is *Ordered*, that the said exceptions to the auditor's report, and the objections stated by the auditor to any claim,

(o) *Carnan v. Turner*, 6 H. & J. 66.

HULSE v. CRADOCK.—This was a creditor's bill, filed on the 21st of January, 1797, to have John Cradock's real estate sold, to pay his debts; sale decreed, &c. The sales as made and reported, were absolutely ratified and confirmed. After which, upon a receipt of a solicitor for his fee, for drawing the answers of the defendants, being presented and filed as a claim against the deceased's estate.

28th March, 1799.—*HANSON, Chancellor*.—This is no debt due from the deceased. It cannot even come in by way of costs, no costs being allowed for drawing answers; it must therefore be rejected.

(p) *Harwood v. Rawlings*, 4 H. & J. 126; *Duvall v. Green*, 4 H. & J. 270; *Bond v. Bond*, ante 353; *Flemming v. Castle*, ante 355; *Dorsey v. Cooke*, ante 526; *Emory v. Seth*, ante 541.—(q) *Tyler v. Bowie*, 4 H. & J. 323.

so far as the same may be in any manner at variance with the principles herein laid down for the government of this court be, and the same are hereby overruled. And it is further *Ordered*, that this case be, and the same is hereby referred to the auditor with directions to state a final account accordingly.

After which, the auditor filed his report made up as of the 26th of June, 1830, in which he says, that in obedience to this order he had examined the proceedings; that an extract from the second account passed by the administrator had been lately filed, from which it appeared, that dividends of the personal estate had been allowed on claims Nos. 1, 5, 7, 8, 13, 14, 16, 31, 32, 33, 35, 37, and 43. That he had, therefore, re-stated those claims, and also stated an additional claim, No. 45, lately exhibited. That he had also stated an account between the estate of the deceased and the trustee, in which the proceeds of sale were applied to the payment of the trustee's allowance for commission and expenses, costs of suit, and dividends on the claims stated, excluding Nos. 39, 40, 41, 42 and 44, agreeably to the said order, and that he had then stated a further account, C, in which the principal and interest, received by the trustee, and now deposited in court, were applied to the payment of said commissions, costs, and claims, in the usual manner. By an order, passed on the 5th of July, 1830, this report was confirmed, and the trustee directed to apply the proceeds accordingly.

HELMS v. FRANCISCUS.

Where it becomes necessary to have the plaintiff's next friend examined as a witness, he may be discharged for that purpose, and another appointed in his place.—It is the duty of the court, for its own safety, and for the benefit of all concerned, to have all its proceedings translated into the English language.—A husband, who can derive no pecuniary benefit from a decree to account, must, nevertheless, be permitted to attend, and to except, for the protection of his own rights.—The cases in which a legacy may be considered as having lapsed.—The residuary legatee takes all which has not been well and sufficiently disposed of.—The binding and peculiar nature of the contract of marriage.—To preserve the public peace and morals, and upon the ground of a stronger policy over-ruling a weaker one, a separation of husband and wife may be allowed.—The father is the natural guardian of his infant children; yet, in some cases, the care of the infant may be committed to the mother.—A *feme covert* may, in the prescribed mode, contract for her property, or, in equity, dispose of her separate estate.—The nature of a separate maintenance and of pin-money.—A separate maintenance may be awarded on the

ground of malconduct of the husband.—The jurisdiction of this court as to alimony.—This court may give to the wife a separate maintenance out of her own estate.—The making of a settlement upon the ground of what is called ‘the wife’s equity.’—How an infant may become a ward of court.—In general, the court settles only a part of the wife’s fortune upon her; but, in some cases, or with the consent of her husband, the whole of her fortune may be settled on her.—The settlement is made upon the wife and her legitimate and illegitimate children; the act of assembly having given to bastards a capacity to take from their mother as heirs or next of kin.

THIS bill was filed on the 14th of September, 1818, by *Anna Gebetha Margaretha Wandelohr*, formerly of Chambersburg, in the state of Pennsylvania, but then of the city of Baltimore, against *John Franciscus* and *Philip B. Sadtler*. The bill stated that the plaintiff’s brother, *Carsten Newhaus*, on the 20th of June, 1816, made his last will, according to law, in which he disposed of his estate in the following words:

‘I give and bequeath unto my nephews, *Carsten Newhaus*, *John Newhaus*, and *Jacob Newhaus*, all of Baltimore county aforesaid, children of my deceased brother, *John Newhaus*, the sum of \$4,000, to be equally divided between and amongst them, that is to say, to each of them the sum of \$1,500. *Item*, I give and bequeath unto nieces and nephews, namely, *Anna G. Bowers*, *Betsey A. Bowers*, ——— *Bowers*, *Henry A. Bowers*, and *John D. Bowers*, the three daughters and two sons of my late sister, ——— *Bowers*, of Bremen, deceased, the sum of \$7,500, to be equally divided between and amongst them, that is to say, to each one of them the sum of \$1,500. *Item*, I give and bequeath unto *John Rathean*, of Baltimore county aforesaid, the sum of \$600; and I do request and direct, that the several legacies herein before bequeathed be paid out of my estate, by my executors, herein after named, as soon as conveniently may be after my decease. *Item*, I give, devise and bequeath unto my sister, *Anna G. M. Newhaus*, of Chambersburg, in the state of Pennsylvania, her heirs and assigns, all the rest, residue, and remainder of my estate and property of every description, of whatsoever it may consist, or wheresoever situated or being; to hold the same to my said sister, *Anna G. M. Newhaus*, her heirs and assigns forever. And lastly, I do hereby constitute and appoint *John Franciscus* and *Philip B. Sadtler* executors of this my last will and testament.’

The bill further stated, that on the 24th of June, 1816, after having made this will, *Carsten Newhaus* died; that the will was proved on the 29th day of the same month, and letters testamen-

tary granted to the two executors, these defendants; who had accordingly got into their possession personal estate of the intestate to a much larger amount than was necessary for the payment of his debts, and the legacies so given to his nephews and nieces, and that the plaintiff was the sister of the testator mentioned in his will, who then resided, as therein stated, in Chambersburg, in the state of Pennsylvania. The bill further stated that the testator was, at the time of his death, and for about seven years before, connected with the defendant *Franciscus* as a partner in the business of a sugar refinery, under the firm of *Newhaus & Company*, and in certain vessels, &c.; and that the greatest part of the testator's personal estate, at the time of his death, consisted of property, effects and debts, belonging and due to the partnership, which partnership concern had not been settled, nor any account thereof rendered by the defendant *Franciscus*, so as to shew what proportion of the effects thereof properly belonged to the testator, and for which the defendant *Franciscus*, as surviving partner, was accountable, as a part of the estate of the testator. Whereupon the bill prayed that the defendant *Franciscus* might be ordered to disclose and set forth the nature and terms of the partnership between him and the testator at the time of his death; to account for all the property, debts, rights and effects of the partnership, and to pay over that which belonged to the testator to his executors, and also that the defendants *Franciscus* and *Sadtler*, as executors, might account for the estate of the testator, and be directed to pay what remained unto this plaintiff as residuary legatee; and that the plaintiff might have such other and further relief as the nature of her case might require.

After the defendants had appeared, but before they had answered, the plaintiff, by petition, prayed leave to amend her bill by correcting her name, as therein stated, and instead of '*Anna G. M. Wandelohr*,' inserting '*Anna G. M. Newhaus*, otherwise called *Anna G. M. Wandelohr*.' On the 2d of October, 1818, leave was granted to amend as prayed, and it was made accordingly, by merely interlining the proposed amendment in the original bill.

On the 1st of March, 1819, the defendants filed their joint answer, in which they admit the partnership, the will, and the death of the testator. But they say, that they do not know the plaintiff, or that she is the residuary legatee mentioned in the bill; nevertheless, supposing she might be the legatee, they had, to relieve her necessities, advanced her the sum of \$1,500, for which they craved

an allowance. They set out, as exhibits, their accounts previous to that time, passed by the Orphans Court, and represent the estate as still unsettled. *Franciscus* stated, that the partnership was formed in April, 1809, of the testator and himself, and none other; that there were no written articles, but each was to share equally; that the firm, at the time of the death of the testator, held a leasehold interest in a house and lot in Baltimore, a ship, called the *General Hands*, and a brig, called *Francis F. Johnson*; that a large amount of other property had come to his hands; but that the partnership affairs had not then been wound up, and he offered to the plaintiff a full and free inspection of the partnership books.

This answer, although purporting to be the answer of both defendants, yet having been sworn to by *Franciscus* only, might have been treated as no answer from the defendant *Sadtler*. But the plaintiff filed exceptions to its sufficiency, in which she distinctly speaks of it as the answer of both, and thereby virtually waived any objection to it, because of its having been sworn to by only one of the defendants. An order was passed appointing a day for hearing those exceptions; but as no further notice was taken of them in any of the subsequent proceedings, they were passed over at the final hearing as having been tacitly abandoned.

On the 11th of February, 1825, *Anna G. M. Helms*, formerly *Newhaus*, by her next friend, *Frederick Augustus Wandelohr*, and *Joseph Sumwalt*, and *John McFarren, Jr.* filed their supplemental bill against *John Franciscus*, *Philip B. Sadtler*, *Carsten Newhaus*, *John Henry Newhaus*, *Jacob Newhaus*, *John Rathean*, *Susan Huller*, otherwise called *Muller*, *Frederick Muller*, *Anna G. Bauer*, *Jacob Bauer* and *Lewis Helms*. This bill, after reciting the substance of the before mentioned original bill, to which this is made a supplement, stated that, since the filing of that bill, the suit had abated by the marriage of the plaintiff *Anna*, with the now defendant *Lewis Helms*, who had separated from her; and that they had entered into a written agreement to live separate, by virtue of which agreement of separation, and of the power of this court to have any property of a *feme covert*, which her husband asks its aid to recover, settled upon her and to her exclusive use, the plaintiff *Anna* insisted that she was entitled to have the whole of the residuary legacy applied to her exclusive use.

This bill further stated, that the surviving partner had finally wound up the affairs of the partnership; that the executors had paid the debts and completely settled up the estate of the testator;

and that a certain property in Germany had devolved upon the late *John Newhaus*, the brother of the testator, the one-third of which on his death vested in his wife, the defendant *Susan*, who with her then husband now probably alive, assigned her interest to the testator; by virtue of which his executors these defendants, have received a large amount; that the executors have not yet accounted for the property received by them or paid to the plaintiff *Anna*, the amount to which she was entitled as residuary legatee.

It further stated, that legacies had been given by the testator in his will to the defendants *Carsten Newhaus*, *John H. Newhaus*, and *Jacob Newhaus*, who were then infants; and as such the defendant *Franciscus* had been appointed their guardian. That the testator's sister — *Bauers*, of Bremen, never had but one child, the defendant *Anna G. Bauers*, now an infant; and that the other legatees, designated as her four other children, never did exist either before or since the testator's death; and consequently, the right to that which had been so given to them by the testator devolved upon, and vested in the plaintiff *Anna* as residuary legatee. But that the defendant *Franciscus* had caused himself to be appointed guardian, not only of the defendant *Anna G. Bauers*, but of the other four supposed infant persons; and had as guardian, retained the sum given to them, and refused to account for or to pay it over to this plaintiff *Anna*; and that a legacy had been also given to the defendant *John H. Rathean*.

This bill further stated, that the plaintiff *Anna* having been indebted before her marriage in the sum of \$636 32, to the plaintiffs *Sumwalt* and *McFarren*; after her marriage with the defendant *Lewis Helms*, and before their separation assigned their interest in her residuary legacy for so much as was necessary to secure the satisfaction of that debt with interest from the 12th August, 1819; and to the extent of which debt they now here claim as plaintiffs in this suit. Upon all which the bill prayed that the defendants *Franciscus* and *Sadtler* might be ordered to account with the plaintiffs; and that they might be ordered to pay to *Sumwalt* and *McFarren* the amount of their claim, and to the plaintiff *Anna* the remainder of the residuary legacy due to her, to be settled on her as the court should direct; and for general relief, &c.

On the 25th of April, 1825, an order of publication was passed warning the absent defendants *Lewis Helms*, *Anna G. Bauers*, and *Jacob Huber*, to appear on or before the 15th day of August, 1825, and shew cause why a decree should not pass. The editor of the

newspaper in which the publication was made certified in the usual manner, that the order had been published as directed; but none of the absent defendants appeared within the time appointed.

On the 14th of June, 1825, *Philip B. Sadtler* filed his separate answer, in which he admitted, that he was one of the executors of the late *Carsten Newhaus*; but alleged that the defendant *Franciscus* had, in all things, been the principally acting executor; that he had retained in his hands the legacies given to the five children of the testator's sister — *Bauers*, of Bremen; and that by virtue of the acts of *Franciscus*, and of their settlements with the Orphans Court as executor and guardian, copies of which he exhibited, this defendant was discharged.

On the 27th of July, 1825, the defendant *Franciscus* put in his answer, in which he referred to and relied upon his answer to the original bill and said, that he could not admit, that *Helms* and wife had agreed to live separate; that he did not know to what amount she was indebted to *Sumwalt* and *McFarren*; that as guardian of the infants *Carsten*, *John H.* and *Jacob Newhaus*, he had retained the legacies given to them; and had also retained the legacies given to the five children of the testator's sister — *Bauers*, of Bremen, for whom he was guardian, and who, he understood did exist; that there was a piece of leasehold property yet unsold, and which he held as part of the assets of the testator; that he had no knowledge of any assignment of any interest in any property in Germany to his testator, but that he had received and held the proceeds of such property which belonged to his wards, the children of the late *John Newhaus*; and that he had accounted with the Orphans Court for and paid a larger amount than had come to his possession of the late *Carsten Newhaus'* estate.

On the 31st of August, 1825, the defendant *John H. Rathean*, filed his answer, in which he admitted, that the legacy given to him had been paid; and that the testator's sister, — *Bauers*, of Bremen, never had but one child, *Anna G. Bauers*, as stated in the supplemental bill. The other allegations, he left the plaintiffs to substantiate by proof.

On the 5th of October, 1825, the defendants *Muller* and wife, filed their answer, in which they positively denied that she had ever made any such assignment of her interest in the estate of her first husband, *John Newhaus'* estate, as was set forth by the plaintiffs; that her second husband was dead; and that these defen-

dants had been legally married; of the other allegations of the plaintiffs, they knew nothing.

On the 10th of January, 1826, the infant defendants *Carsten Newhaus*, *John H. Newhaus*, and *Jacob Newhaus*, answered by their guardian *ad litem*, and admitted the will of the testator; that the executors had obtained letters testamentary; and that *John Franciscus* had been appointed their guardian; but as to all else, knowing nothing, they left the plaintiffs to sustain their case by proof.

By a writing filed on the 11th of April, 1826, it was agreed between the solicitors of the plaintiffs, and the solicitor of the defendant *Franciscus*, that a commission should issue to four persons named, of Baltimore, to take testimony; a commission was accordingly issued, testimony taken and returned; and no exceptions were taken to it. And on the 13th of July, 1826, it was, on the petition of the plaintiffs, *Ordered*, that a commission issue to the four persons named, to take testimony in Bremen, unless before the 27th instant, the defendants name, and strike commissions, which they having failed to do, a commission issued accordingly.

The plaintiffs, by their petition, stated, that *Frederick A. Wandelohr*, who had been made a plaintiff only, as the next friend of the plaintiff *Anna*, was a material and important witness for them; but being, as he then stood, interested in the event of the suit, and therefore incompetent; they prayed that he might be discharged; and that *Charles F. Mayer* should be allowed to take his place; the said *Mayer* having consented to do so, and to become bound in all respects, as the next friend of the plaintiff *Anna*.

1st September, 1826.—BLAND, *Chancellor*.—It is clear that any one, so long as he stands before the court as the next friend of an infant or a *feme covert* plaintiff, being liable for costs, is therefore an interested and incompetent witness. (a) But where the object is not to favour the escape of such a next friend from any liability, arising from the suit's having been improperly instituted or conducted by him, he may be made a competent witness by being discharged, and having another put in his place; and the court will, on application, at any time before the final hearing, allow a

(a) *Head v. Head*, 3 Atk. 547.

change to be made for that purpose, on its being shewn to be necessary, and on the costs then incurred, being secured. (b)

Ordered, that *Charles F. Mayer* be, and he is hereby appointed next friend of the plaintiff *Anna G. M. Helms*, instead of the said *Wandelohr*, as prayed.

The commission to Bremen having been returned, and filed on the 15th of September, 1827; and it appearing that the depositions of the witnesses had been taken in the German language, with a translation; the defendants objected, that the case could not be heard until those depositions were more correctly translated; and the plaintiffs applied by petition, to have them translated accordingly.

10th January, 1828.—BLAND, *Chancellor*.—This matter has an origin and bearing worthy of more attention than seems to have been usually bestowed upon it. I shall therefore here, once for all, avail myself of this occasion to advert, as briefly as may be, to the laws and principles upon which the parties have a right to have depositions correctly put into English before the case is set for hearing.

An English statute passed in the year 1362 sets forth, that great mischiefs had happened because the laws were not commonly known, for that they were pleaded, shown, and judged in *French*, which was much unknown; so that the people who plead, or were impleaded in the courts had no knowledge or understanding of that which was sued for, or against them; that the laws would be known and better understood in the tongue used in the realm; so that every man might the better govern himself without offending, and the better keep, save, and defend his heritage and possessions. And thereupon enacts, that all pleas which should be pleaded in any court, should be shewn, defended, answered, debated and adjudged in the *English* tongue; and be entered and enrolled in *Latin*. (c) By an act passed by the illustrious *Long Parliament*, in the year 1650, during the short lived Commonwealth of England, it was declared, that all report books, and other books of the law, and all proceedings in the courts of justice, should be in the *English* tongue only, and not in *Latin* or *French*, or any other language; and should be written in an ordinary,

(b) *Witts v. Campbell*, 12 Ves. 493; *Melling v. Melling*, 4 Mad. 261.—(c) 36 Ed. 3, c. 15; Parke's *His. Co. Chan.* 43.

legible hand, not in court hand. (d) Upon the restoration of the monarchy, this law of the commonwealth was abrogated, and judicial proceedings were again obscured or concealed under a foreign language 'much unknown.' At length, however, common sense having again forced its way, it was, by a British statute, passed in the year 1731; after reciting that great mischief frequently happened, from the proceedings in courts of justice being in an unknown language, those who were impleaded having no knowledge or understanding of what was alleged for or against them in the pleadings of lawyers, who used a character not legible to any but persons practising the law; enacted, that all proceedings whatever, in any courts which concern the administration of justice, should be in the *English* tongue only, and not in the *Latin* or *French*, or any other language; and should be written in such a common, legible hand, as the acts of parliament are engrossed in; and not in a court hand; and in words at length, not abbreviated. (e)

From these legislative enactments, and from the history of the times, it is clearly deducible, that it had always been considered to be a matter of the highest importance, that justice should be openly and publicly administered; and that, as a means of making that publicity, in all respects, most beneficial and available, all books of the law, and all judicial proceedings were directed to be published and conducted in the language of the people of the country. Hence it was, that the Norman conquerors of England, for their own advantage and security, had the laws written and administered in their own language; and that afterwards, when that domination had worn away, or indeed been reversed, in the year 1362, the English was in a great degree, restored as the language of judicial proceedings; and that finally in the year 1731, the use of all foreign languages in the administration of justice in England was totally prohibited.

It is of the greatest importance to all, that justice should be in every sense publicly administered. It is the best security to the rights of the people and to the independency of the judiciary. By placing it in the power of every one to see, hear, and understand how the laws are administered; and by exhibiting before all a practical application of the rules by which the rights and interests

(d) Scobell, 143, 4 Brod. Brit. Emp. 320; Parke's His. Co. Chan. 134; 1 Westm. Hall, 5.—(e) 4 Geo. 2, c. 26; 6 Geo. 2, c. 14; 3 Blac. Com. 318; Mitf. Plea. 8; Parke's His. Co. Chan. 305.

of all are governed, the understandings of the people are enlightened, and the peace of the community is preserved. By an open course of judicial proceeding, in the language of the country, it may be readily understood, if there be a fault, whether it be in the law, or in the administration of the law; if it be in the law, it may be amended and the judge sustained; if in the judge he may be held responsible, and the law be applied and enforced by a more skilful and worthy agent. It was evidently upon these considerations, that those English legislative enactments required the laws to be administered in the English language. Hence it is not merely as a matter of convenience to the court; but as a means of giving due publicity to judicial proceedings; and in order, that all suitors may know what is said for or against them, that all the pleadings, proofs and proceedings of the court must be instituted, or translated into the English language.

In Maryland, as well before as since the statute of 1731, all legislative enactments and judicial proceedings were expressed in English, and in no other language; (f) and therefore, by the common law of the state, independently of any positive act of the legislature, it may be regarded as a duty of all the courts of justice to have all their proceedings put into English before any judgment is pronounced upon the matter in controversy. And for the purpose of having a correct translation made of the deposition or document it may be confided to a fit, competent, and sworn translator. (g)

Ordered, that *Charles T. Flusser* be, and he is hereby appointed to make and return, on oath, a full and correct translation of the said depositions as prayed by the foregoing petition.

On the 10th of February, 1830, *Mordecai L. Flagler* filed his petition in this case, in which he stated, that the defendant *Lewis Helms* had, by a certain instrument of writing, promised and obliged himself to pay to him the sum of \$1,200 out of the sum which he might recover in this suit; by virtue of which the petitioner had and claimed to have a lien, to that amount on any sum which might be decreed to *Helms* and wife; and prayed that it might be ordered to be paid to him accordingly.

The defendant *Lewis Helms* by a petition, not on oath, filed on

(f) Kilty's Rep. 249.—(g) *Smith v. Kirkpatrick*, 1 Dick. 103; *Belmore v. Anderson*. 2 Cox, 288; *Fauquier v. Tynte*, 7 Ves. 292; *Atkins v. Palmer*, 6 Com. Law Rep. 453; 1 Fowl. Exch. Pra. 373; 2 Fowl. Exch. Pra. 75, 135.

the 1st of January, 1828, applied for leave to put in his answer, stating his reasons for not having done so sooner, which prayer being refused, he filed another petition, and various other proceedings were had in relation thereto ; when on the 25th of March, 1830, by a writing signed by the solicitor of the plaintiffs and of the defendant *Helms*, it was agreed that the testimony taken in relation to the petition should apply also to the answer tendered by him to the supplemental bill, if received ; and that if that answer was received the case should stand for hearing ; and a general replication be filed to that answer also. On the next day the plaintiffs' solicitor endorsed the proffered answer of *Helms* as follows : 'the complainants allow the within answer to be admitted into this cause, and the register is requested to enter, in behalf of the complainants, the general replication to it.'

The answer of *Lewis Helms*, thus introduced, admitted the facts and circumstances of the will, the partnership, and other matters charged in the bill as against the defendants *Franciscus* and *Sadtler*, and then stated that he found the plaintiff *Anna* residing in Chambersburg, Pennsylvania, keeping a small store, and reputed to be a widow, having an only son, *Frederick A. Wandelohr*, and as such he married her on the 12th of October, 1819 ; but he was deceived ; for soon after his marriage he ascertained that she never had been married, and that she had also concealed from him the fact of her being then herself largely indebted ; that within a few months after their marriage his wife solicited him to become surety for the payment of certain debts due from her son, and also from others to a large amount, which he refused ; soon after which, she disposed of the most of their moveables, and went to Baltimore ; and on the 7th of February, 1820, having caused him to be invited to an interview at the house of *John H. Rathean*, where she and her confederates locked him in a room with them, and by great threats of personal violence, insisted on his releasing all rights to any property to which she was, or might be in any way, entitled, and to leave the country ; but he refused, and made his escape unhurt. That his wife *Anna*, having got possession of his family papers, and clothes, refused to deliver them to him ; that she defamed and slandered him much, by which his character suffered greatly in Baltimore. That a certain *Jacob Merkle*, who held his promissory note for the sum of \$61 28, at the instigation of the plaintiff *Anna*, sued him for payment, and he being unable to pay, was, at the suit of *Merkle*, on the 6th of June, 1820, imprisoned in the

jail of Baltimore county, and so detained there until the 17th of July, 1821 ; that during his imprisonment his sufferings were various and extreme ; because one *Kugle* had detained a trunk of his clothes, until he should be satisfied a small sum due to him, which he was unable to pay ; because his wife refused to send him his clothes which she had in possession, and because he was utterly destitute and penniless ; but that, at length, *Merkle*, being convinced by the statements made to him by this defendant, that his wife had deceived him, offered to release this defendant on his giving his promissory note for the principal and interest of the debt then due, with the fees, amounting to about \$100 30, which he gave, and was accordingly discharged from jail. That, having heard of the threats of his wife and her confederates ; and that she intended again to have him imprisoned, he went, on the 14th of November, 1822, to Pennsylvania, and after some months returned to get his papers and clothes, and to meet and repel the defamatory reports put in circulation by his wife, that he had left her in poverty, to take up with a lewd woman ; that he then made propositions to her of peace and conjugal association, which were rejected ; that having again heard of the plans and threats of his wife and her confederates, to cause him to be again imprisoned, and being again urged to release all his rights in her property, and to leave the country, he did, without any intention to relinquish his claim, yield to the coercion of the circumstances with which he conceived himself environed, and on the 29th of August, 1823, signed a certain release or articles of separation, not, however, without his having some difficulty in finding a magistrate who could be persuaded by him to take the acknowledgment of such a writing, they believing it to be illegal and void ; that the copy of this instrument set forth in the bill is spurious, the true copy being the one left in the hands of *Edward P. Roberts* ; that after executing this writing, he obtained some, not all, of his papers and property from his wife, and left Baltimore for New York, where he now resides ; that soon after reaching the city of New York he was again, by the instigation of his wife, arrested at the suit of *Merkle*, and held to bail ; that the threats and conduct of his wife have been and are such, that he is afraid to return to Baltimore ; that he has always treated her kindly, and is willing to continue to do so ; that so late as November, 1827, he proposed to her peace, harmony, and re-union which she positively rejected ; that the supplemental bill was filed by her with a hope and expectation

of obtaining a decree for her own exclusive benefit during his absence and without his knowledge, and that all the other matters and allegations in the bills are correct.

This answer was sworn to before a master in chancery in New York, and certified by the mayor of the city of New York, under the corporation seal, in the usual manner.

26th June, 1830.—BLAND, *Chancellor*.—This case standing ready for hearing, the solicitors of the parties were heard, and the proceedings read and considered.

After passing over the will of the late *Carsten Newhaus*, and the various allegations of the parties, it appears from the proofs, that the testator's sister, *Geshe Adelheid Newhaus*, called ——— *Bowers*, of Bremen, in the will, was married to *Frederick Bauer*, of that place, on the 8th of July, 1807, and that she died on the 5th of January following; after having had but two children; the first, *Catherine Steinhauer*, an illegitimate child, born before her marriage, and who died, unmarried and without issue, on the 16th of July, 1817; and the second a legitimate child, *Anna G. Bauer*, born on the 27th of August, 1807, after her marriage with *Bauer*; this sister of the testator never had any other children; and that *Anna G. Bauer* was, on the 23d of November, 1826, married to, and is now the wife of *Diederich Meier*.

It further appears, that the other sister of the testator, one of these plaintiffs, *Anna Gebetha Margaretha Newhaus*, was born in Germany, and christened there on the 17th of February, 1775; that some time before the year 1800, she had an illegitimate child named *Frederick A. Wandelohr*, who is now living; that prior to the year 1815, she and her child came over from Germany to Maryland; and some time previous to the year 1816, having put off the name of *Newhaus*, she went to reside in Chambersburg, in Pennsylvania; and there kept a small store; and was much respected by the name of *Mrs. Wandelohr*. At that place, on the 12th of October, 1819, in the forty-fourth year of her age, she was married to this defendant *Lewis Helms*. In the latter end of the month of November following, *Helms* and his wife came to Baltimore; and in a few days after their arrival, he caused a power of attorney, and a last will to be prepared by a notary public, intending them to be executed by his wife, for the purpose, as he supposed, of effectually conveying to him all her interest in the estate of the late *Carsten Newhaus*. She positively refused to sign and execute those instruments; and was much distressed at

her husband's proposing that she should do so. Soon after this, she returned to Chambersburg; and he remained in Baltimore. He has produced in evidence, some of her letters to him, all of which, do credit to her understanding; and the first of them dated on the 18th, 21st, and 29th of December, 1819, are expressive of a warm affection for him; except, that shortly before the date of the last, it seems as if he had written to her something calculated to vex and distress her. In the same winter, or in the ensuing spring of 1820, she returned to Baltimore, and there had a meeting with her husband, and after a most boisterous quarrel, they parted, and have met no more. Letters and messages have since passed between them; but they have never since cohabited; nor even interchanged the common civilities of life.

The causes of this angry separation, would seem to have been her having, by a perusal of his family papers as he called them, obtained a knowledge of his really vicious, sordid character, as disclosed by those papers; and his pressing efforts to get possession of her fortune, which, with his character, as developed to her by his papers, had produced a conviction on her mind, that he had married her only for the sake of her money; and her representing herself to him as being, previous to their marriage, a widow, when the fact was not so. These causes of animosity have since, from time to time, been re-kindled, and more and more heated, until a state of settled dislike has been produced, which, as was admitted in argument by the solicitors of both of them, it is now altogether impracticable to remove, and have them again brought to cohabit together upon any terms.

It appears, that from the 6th of June, 1820, to the 17th of July, 1821, he was closely confined in the jail of Baltimore county, at the suit of *Jacob Merkle*, for a debt of no more than \$61 28; and that during that time, his sufferings were, in every way, as great as could be produced by a state of the most abject friendless penury. It is said, that she was the instigator of this imprisonment, by having told *Merkle*, that if he would put *Helms* in jail, she would pay the amount in a short time; but on the other hand, it is also said, that *Merkle* was particularly incensed by the conduct of *Helms* himself, and said that he had treated him badly.

Some time after this, *Helms* and his wife, on the 29th of August, 1823, made, signed, sealed, and delivered an instrument in writing, in the following words, that is to say:

'*Lewis Helms*, and his wife *A. G. M. Helms*, have formed a

mutual resolution to dissolve their marriage contract; and do hereby, by the present instrument of writing, voluntarily agree to separate themselves. Furthermore, *L. Helms* doth bind himself to renounce all the claim he has against his wife, *A. G. M. Helms*, as well as the claim he might have against the estate of her deceased brother, *Carsten Newhaus*. *A. G. M. Helms*, in return, renounces all claim she may have against *L. Helms*. Thus both parties mutually agree to live separate, and the debts which have been contracted or may be contracted hereafter, to be paid by the person who contracts it.'

It appears, that so far from any duress, coercion, or threats having been used to induce *Lewis Helms* to execute this instrument of writing, it was wished for, and even earnestly desired by him, as a means of protecting himself against any claim made by, or on account of his wife; and in consideration of that, he cheerfully relinquished all interest in her estate.

It further appears, that since *Helms* and his wife parted, in the spring of the year 1820, he has never contributed in the slightest degree to her maintenance; that since their separation, he has resided some time in Pennsylvania; some time in this state; and for some time past has been, and now is, a resident of New York. It is not shewn, that there has been any one point of time, since his marriage, when he was not in the very lowest condition of insolvency; nor is it shewn that he has ever, since his marriage, made one single manly effort to rise above that condition. She, since their separation, has always resided in Baltimore. She too, is represented as being very poor; but she has sustained a good character; has been industrious; has kept a boarding-house; has earned a living for herself; and her efforts to do so have been creditable to her.

Of the proofs in relation to the assets of the testator, I shall say nothing; because I shall decree that his executors account; and upon that, the whole case will be sent to the auditor, for the purpose of stating the account from the proceedings and proofs now in the case, and such other proof as may be laid before him.

The supplemental bill of revivor, by which the court was first informed of the marriage of the plaintiff *Anna*, after the institution of this suit, made her husband, *Lewis Helms*, a defendant; and represented him as having a residence beyond the jurisdiction of this court. Under such circumstances, no more could be done than to warn him by publication, to appear and defend his rights;

and if he failed to do so, to assume the truth of the plaintiffs' allegations, and decree accordingly. But after the day limited by the order of publication to appear, had elapsed, and before any decree had been passed, *Lewis Helms* came in by petition, and prayed to be allowed to put in the answer which he then tendered, in defence of his rights.

It was obvious that the matter in controversy, as regarded the executors; and as between *Helms* and his wife, could not be properly and finally disposed of, until it was determined whether he was to be taken as an active party or not. His pretensions covered the whole matter in dispute. He claimed to have the account taken with him; and to have the legacy paid entirely to him. And consequently, to have allowed the case to proceed to an account between the plaintiffs and the executors alone, with a reservation of all the husband's rights, as they might be introduced at a subsequent stage of the case, would have been, in effect, to pass a decree with an understanding, that a party who stood by, might, if he chose, have the whole matter re-examined and re-adjudicated. This, I refused to allow; and after some delay, the plaintiffs consented that the defendant *Lewis Helms*, should come in upon his proffered answer. Although I may come to the conclusion that it would be unjust to direct any part of this residuary legacy to be paid to him, yet he should be permitted to assist in taking the account; and have the privilege of excepting to it when reported by the auditor, to prevent his rights from being in any manner improperly involved, or finally compromised to his prejudice.

This is a case of a very singular complexity. The principal object of the suit is to recover a residuary legacy given by the late *Carsten Newhaus*, to the plaintiff *Anna*, and to ascertain how much of the testator's estate should be embraced by that bequest. Another object is to have the whole of the legacy thus given, settled upon the plaintiff *Anna*, to the exclusion of her husband, the defendant *Lewis Helms*; except so much of it as has been pledged or assigned to the plaintiffs *Sumwalt* and *McFarren*. But if the court should determine that the defendant *Lewis Helms*, is entitled to any portion of it, then, to meet that event, *Mordecai L. Flagler* has introduced himself into this case, by his petition; and prayed to have his claim considered and satisfied, as the creditor and assignee of the defendant *Lewis Helms*.

There can be no doubt, from the pleadings and proofs, that the

executors must be decreed to account and to pay over this residuary legacy. But for whose benefit? Whether to the husband, or to the wife exclusively? or to both in certain proportions? or to their assignees? These are important and preliminary questions. In this respect, this has the aspect of a bill of interpleader between this husband and wife, to determine their rights, while the executors stand by as stake-holders, ready to account and to pay as they may be ordered.

As to what must be considered as embraced by this residuary legacy. It was formerly an established general rule, that unless the legatee survived the testator, the legacy was extinguished; which has been altered by an act declaring that no devise or bequest shall lapse by reason of the death of the devisee or legatee, in the life-time of the testator; but shall take effect as if he had survived the testator. (*h*) Still, however, if a legacy be so given, that the legatee's right depends on his being alive at the time fixed for its payment; or if the legacy be charged upon the real estate, and the legatee dies *after* the death of the testator, but *before* the time of payment, the legacy is lost. (*i*) Here, however, there has been no such lapsing of any legacy given by this testator. But it is a well established rule in the construction of wills, that wherever the testator has given the whole residue of his personalty to an individual, such residuary legatee, will take all the personal estate which is not otherwise well and sufficiently disposed of, whether a legacy falls in by lapse, or as being void in law; or in other words, where a legacy fails as to a particular object, it will not go to the next of kin, but must pass to those entitled under the residuary clause. (*j*)

In this case it has been very satisfactorily shewn, that the testator's sister, — *Bauers*, of Bremen, never had but two children. One of whom, *Anna G. Bauers*, only he has named in his will; of the other, *Catherine*, although living at the time of his death, he has taken no notice; and the four others, whom he names, never had any reality or existence. Consequently, the bequests of those four legacies being utterly void, they pass to this plaintiff *Anna*, as the residuary legatee; and must be accounted for, and paid by the executors, as a part of that legacy accordingly.

(*h*) 1810, ch. 34, s. 4.—(*i*) *Williams' Exrs.* 767, 780.—(*j*) *Brown v. Higgs*, 4 Ves. 709; *S. C.* 5 Ves. 501; *Dawson v. Clark*, 15 Ves. 417; *Rothmahler v. Myers*, 4 Desau. 215.

The conflicting claims of this husband and wife present the next subject of inquiry, and the adjustment of them will require some care and attention.

According to our law, the marriage contract so strictly and intimately unites husband and wife, that they form, as it were, but one person; and in contemplation of law, the wife is considered as having scarcely any separate existence. The husband is the head, and therefore all the property of the wife belongs to him. This peculiar compact is of so lasting a character, that this court recognizes no power in the parties to vary the rights and duties growing out of it, or to effect, at their pleasure, any partial, much less a total dissolution of it during their lives; it is one by which the parties impose duties on themselves, and engage to perform duties with respect to their offspring; duties which are as much imposed for the sake of public policy as of private happiness; and which, therefore, they are never permitted to cast off at their pleasure. From these general principles it follows, that husband and wife are incompetent to contract with each other for the purpose of binding, or conveying property in any manner, directly from one to the other. And, having an inviolable right to the aid, comfort, and society of each other, they cannot separate or have any mere agreement between themselves for a separation, enforced by a court of common law or equity. (*k*)

But, although it is, in general, true, that husband and wife cannot, of their mere motion, dissolve the marriage contract, yet courts of law and of equity, without pretending to any authority either to sanction or enforce cohabitation or separation, will protect either party from the personal violence, or gross moral offence of the other; and, for that purpose, allow of, and even enforce a separation. This, however, is always done from necessity, and with a view to preserve the public peace, or to prevent the open contamination of the morals of society; as where a husband, indulging in a base, unmanly temper, was in the habit of beating his wife, or, with brutish feelings, introduced lewd women with her into his household. This *pro tanto* separation is not, however, an impeachment of that public policy by which marriage is regarded as so sacred and inviolable in its nature; it is merely a stronger policy over-ruling a weaker one; and except in so far only as such

(*k*) Co. Litt. 112; Head v. Head, 3 Atk. 550; Worrall v. Jacob, 3 Meriv. 268; Westmeath v. Westmeath, 4 Cond. Chan. Rep. 60.

a separation is tolerated as a means of preserving the public peace and morals may be so considered, it does not, in any respect whatever, impair the marriage contract, or for any purpose, place the wife in the situation of a *feme sole*. (*l*)

It has been thought that, without putting at hazard any regulation necessary to insure conjugal felicity, a woman might, very beneficially for herself as well as her husband, be indulged with some more latitude of free will as to contracts, and a larger extent of individuality of character in relation to the right of property. By the common law, her will and her rights, in those respects, are so absolutely submerged and covered over by those of her husband, that she is not only made dependent on him for domestic happiness, out is tied to his fortunes, and deprived of all means of saving herself from the most abject penury in cases where, by means of a larger share of independent right, she might rescue herself and children from the wayward or the luckless course of her husband, and thus promote, instead of disturb, conjugal harmony. But those stern and ungallant general rules of the common law, by which marriage so sinks the wife under the absolute sway of the husband have been made, in many respects, to yield to a better feeling, and have undergone many wholesome modifications chiefly by the direct, or indirect application of the principles of equity.

(*l*) *Lister's case*, 8 Mod. 22; *Rex v. Mead*, 1 Burr. 542; *Whorewood v. Whorewood*, 1 Cha. Ca. 250; *Williams v. Callow*, 2 Vern. 752; *Head v. Head*, 3 Atk. 548; *St. John v. St. John*, 11 Ves. 529; *Wellesley v. Beaufort*, 3 Cond. Chan. Rep. 1; *Westmeath v. Westmeath*, 4 Cond. Chan. Rep. 55.

The having obtained a writ of *supplicavit*, is no reason that the wife should elope, or be separated from her husband, for it is a security taken for the wife, upon a supposition that they are to live together. *Head v. Head*, 3 Atk. 550; *Clavering's case*, 2 P. Will. 202; *King v. King*, 2 Ves. 578; *Heyn's case*, 2 Ves. & Bea. 182

BREAD'S CASE.—Charles, &c.—To the Sheriff of Charles county, greeting, Whereas Jane, the wife of John Bread, of your county, hath made supplication unto us, that she hath been grievously and manifestly threatened by her said husband of her life and of mutilation of her members, we being willing, in this behalf, to provide for the security of the said Jane, do command you, firmly enjoining, that you cause the said John Bread personally to come before you, and him compel to find sufficient security, under a certain penalty by you, for our use, reasonably to be imposed, for which to us you will answer; that he, the said John Bread, the said Jane well and truly will treat and govern; and that the said John do not, by any means, do, nor procure to be done, any damage or evil to the said Jane of her body, otherwise than what to a husband, by cause of government and chastisement of his own wife, lawfully and reasonably belongeth. And if this before you to do he refuseth, then, that you take him, and him safe keep until he find security in form aforesaid. Dated 9th September, 1681.—*Chancery Proceedings, lib. C. D. fol. 319.*

The father is the rightful and legal guardian of all his infant children; and in general, no court can take from him the custody and control of them, thrown upon him by the law, not for his gratification, but on account of his duties, and place them against his will in the hands even of his wife. (*m*) But although the courts of common law can enforce the *rights* of the father, they are not equal to the office of enforcing the *duties* of the father; and therefore, where the children have any property, which can give this court the means of acting in their behalf, it will protect them as well against the misconduct of their father as against their legal guardian. (*n*) Yet even a court of common law will not go so far as to hold nature in contempt, and snatch helpless, puling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father. The mother is the softest and safest nurse of infancy, and with her it will be left in opposition to this general right of the father. (*o*)

The common law vests a right in the wife to be endowed after her husband's death out of all the lands of which he was seized during the coverture, unless she has a jointure legally settled upon her in lieu of dower; and her title to all lands held in her own right remains unimpaired by the marriage. But the incapacity with which she is covered by the marriage leaves her no means, at the common law, of dealing with the title she holds in her own right, or with her vested right to dower or jointure, either for her own, or her husband's benefit, during the coverture; except by the formulary of a suit called *a fine*, and a private examination by the court itself. In lieu of this *fine* our law has directly restored her capacity to contract by means of a simple prescribed form concerning her vested right of dower, or her jointure, as well as respecting her own lands of which her husband is entitled to the rents and profits only during coverture, or which he may have acquired a vested right to hold as tenant by the courtesy. (*p*) The wife may take and hold property of any description to her sole and separate use, independently of her husband, which she may be empowered to alienate, encumber, give, or devise in any manner at her pleasure. And if she relinquishes her dower, or jointure, or sells, disposes of, or encumbers her lands held in her own right,

(*m*) *St. John v. St. John*, 11 Ves. 531.—(*n*) *Wellesley v. Beaufort*, 3 Cond. Cha. Rep. 1; *Lyons v. Blenkin*, 4 Cond. Chan. Rep. 115; *Jones v. Stockett*, ante 429; *Corrie's Case*, ante 503.—(*o*) *Prather v. Prather*, 4 Desau. 33.—(*p*) *Hannah K. Chase's Case*, 1 Bland, 229.

or her separate property for the purpose of paying his debts or of otherwise forwarding his views; or she becomes his surety, as she may in respect to her separate property; a court of equity will order her to be re-imbursed out of her husband's property if any shall remain after his creditors have been satisfied. (q)

These and other instances which might be cited clearly shew, that a wife, during coverture, is not altogether so destitute of a capacity to contract respecting her property as is indicated by the general terms of the rule of the common law; but, that a husband and wife may, in particular situations, treat together effectually, if they treat upon fair and reasonable terms. (r)

It is now universally admitted, that a husband and wife are utterly incompetent, of themselves, by any agreement of their own, to effect even a partial dissolution of the marriage contract; but they are allowed to agree to live apart; and as auxiliary to that agreement, if the husband stipulate, through the instrumentality of a third person, to allow and pay to his wife a separate maintenance, such a stipulation is legal; and may be enforced against the husband, either in a court of law, or of equity; although it has originated out of and relates to that unauthorized state of separation in which the husband and wife have endeavoured to place themselves. A separate maintenance of this kind and pin-money are alike in this respect, that they are founded on a special contract, and only payable during the marriage. Pin-money is given gratuitously for her personal and private expenditure; it is an allowance always payable during co-habitation; whereas a separate maintenance is that provision which a husband contracts to pay to his wife where they have agreed to live apart and is payable only during the period of separation; and in this respect differs from pin-money. The examination of a few of the decisions in relation to a separate maintenance of this description will be sufficient to shew what is considered to be its general character in the courts of common law as well as in equity. (s)

(q) *Huntington v. Huntington*, 2 Vern. 437; *Pocock v. Lee*, 2 Vern. 604; *Tate v. Austin*, 1 P. Will. 264; *Bagot v. Oughton*, 1 P. Will. 347; *Quarles v. Lacey*, 4 Mun. 258; *Gosden v. Tucker*, 6 Mun. 1.—(r) *Hobbs v. Hull*, 1 Cox, 445; *Arundell v. Phipps*, 10 Ves. 140.—(s) *Raynes v. Lewes*, Nelson, 88; *Whorewood v. Whorewood*, 1 Cha. Ca. 250; *Head v. Head*, 3 Atk. 295; *S. C.* 3 Atk. 547; *Guth v. Guth*, 3 Bro. C. C. 614; *Legard v. Johnson*, 3 Ves. 352; *St. John v. St. John*, 11 Ves. 526; *Worrall v. Jacob*, 3 Meriv. 256; *Westmeath v. Westmeath*, 4 Cond. Cha. Rep. 56; *Rodney v. Chambers*, 2 East. 283; *Wallingsford v. Wallingsford*, 6 H. & J. 455.

But in the case under consideration, there is nothing which can be construed as a contract on the part of the husband, to pay to his wife any thing as a separate maintenance. It is true, that they have, by an instrument of writing, agreed to live separate; and that he has released to her all claim to property, which he might have recovered as her husband; but he has not, in any manner, stipulated to provide for her a separate maintenance; and therefore, no adjudication in relation to the contract of a husband, for the separate maintenance of his wife, can be applied to, or need be considered in this case.

A mere agreement of a husband and wife to live apart, does not of itself, and without any contract to that effect, afford any ground upon which she can sustain a claim for separate maintenance. But if, by the cruel or immoral conduct of the husband, the wife cannot with safety and in decency, consort with him, then she may, upon the ground of such ill-treatment, come into a court of equity, and have a separate maintenance assigned to her by the court, out of her husband's estate, of an amount proportioned to his means and circumstances.

There seems to have been some difficulty in England upon this subject; because it is said, of this claim's being founded upon the misconduct of the husband; and of the ecclesiastical courts having the exclusive cognizance of all matrimonial cases; and as the kind of separate maintenance called *alimony*, is never allowed, but as a consequence of a divorce *a mensa et thoro*, that therefore, a court of equity could not take cognizance of a claim for separate maintenance, founded only on the misconduct of the husband, until after a divorce *a mensa et thoro*, had been granted by the ecclesiastical court. The difficulty of the English court of equity, it is evident, arises from the claim for a separate maintenance of this kind, involving the question of divorce, of which it has no jurisdiction. But it is admitted on all hands, that under such circumstances, the wife ought to be relieved, and should be able to obtain relief somewhere.

In England, during the short existence of the Republic, after the decapitation of the first king Charles, the ecclesiastical courts were abolished; and, in consequence thereof, the entire jurisdiction in all cases of alimony and of separate maintenance, devolved, as a matter of course and necessity, upon the Court of Chancery, as the only tribunal fitted and competent to decide

thereon. (t) And for the same reason, in several states of our Union, there being no ecclesiastical court, the cognizance of such matters has been held to belong most properly to the Court of Chancery. (u)

In Maryland, there never was an ecclesiastical court, and therefore, the High Court of Chancery always had, even under the provincial government, entire jurisdiction of such cases of claims for alimony, or for separate maintenance out of the husband's estate, founded on his misconduct; (w) but this branch of the jurisdiction

(t) *Whorewood v. Whorewood*, 1 Cha. Ca. 250; *Oxenden v. Oxenden*, Gilb. Eq. Rep. 1; *Head v. Head*, 3 Atk. 550; Anonymous, 2 Show. 282, 1 Mad. Chan. 386, note.—(u) *Purcell v. Purcell*, 4 Hen. & Mun. 507; *Prather v. Prather*, 4 Desau. 33; *Rhame v. Rhame*, 1 McCord. 205.—(w) *Galwith v. Galwith*, 4 H. & McH. 477; *Hewitt v. Hewitt*, 1 Bland, 101.

MACNAMARA'S CASE.—This case was brought before the court by a petition, filed on the 13th of October, 1707, by Margaret Macnamara against Thomas Macnamara, her husband. It stated, that she having been before constrained to seek redress from the Chancellor against the cruel usage of her husband, was then, once more, compelled by his continued severities, daily manifested to the world, not only by threats, sufficient from a man of his ungovernable temper to frighten a poor helpless woman out of her life, but also by merciless stripes, the most scurrilous language unbecoming a man, by a tyrannical domineering carriage, too severe to be used even to slaves, and by a beastly lust, she blushed to name it, in the gratification of which, his indifferency in the use of white or black, clean or foul, was such, that nature's law, self-preservation, dictated the danger of any commerce with him. That there was no safety for her under the same roof with him, he having frequently, in his mad raptures, exclaimed against himself for not making away with her. She therefore humbly implored protection from his barbarous cruelties. And prayed that she might be permitted to live separate from him; that he might be obliged to allow her such a reasonable maintenance, as, upon consideration of his circumstances, might be thought proportionable thereto; that he might be required to give good security for the performance of what should be ordered, so that she and her poor children might not be left destitute, and that he might be ordered to deliver her clothes and other little necessities to her, she being so stripped, that she had not wherewith to shift herself.

In this case, John Seymour, the Governor and Chancellor, associated to himself Major-General John Hammond, Judge of the Court of Vice-Admiralty, and one of the council of the Province. Whereupon, it was *Ordered*, that Thomas Macnamara be forthwith summoned to appear. And the officer having made return, that he had gone out of town, it was *Ordered*, that he should appear on the 16th instant, to answer the petition, and he appeared accordingly, but refused to answer.

16th October, 1707.—SEYMOUR, Chancellor.—The petition being read to Thomas Macnamara, he was ordered to answer thereunto, which he obstinately refused to do, offering a plea, *ore tenus*, to the Chancellor's jurisdiction of the matter, and pretending to support it by the practice of the spiritual courts in England, which in the infancy, low circumstances, and present constitution of this province, prevent us from being able to pursue here for want of such courts or maintenance for the proper officers of them. Wherefore, the Chancellor being convinced, not only by undeniable testimonies, but even by his own knowledge of the inhumanity and barbarity

of this court, has been placed beyond all further question, by an act of assembly, which declares, 'that the Chancellor shall and

of the said Thomas Macnamara towards his wife, manifested not only to the Chancellor, but to all Her Majesty's council in assembly, before whom appeared, not long since, the said Margaret, so battered, bruised, and inhumanly beaten in most parts of her body, that had she not been of a constitution more than ordinarily strong, she could hardly have recovered it: and finding by daily expressions the said Thomas to be of a mad, turbulent, furious, and ungovernable temper; therefore, for the preservation of the poor petitioner's life,

It is *Ordered*, that during the time the said Thomas and Margaret shall continue separate, and until they shall mutually reconcile themselves to each other, and cohabit, he, the said Thomas, shall allow and pay to the said Margaret his wife, £15 sterling *per annum*, by quarterly, or at least by half-yearly payments, to commence from the sixteenth day of October. And it is further *Ordered*, that he forthwith deliver unto her the wearing clothes and other small necessities to her belonging, herein particularly specified, *viz*: one gown, &c. &c. *Ordered*, likewise, that the aforesaid order be served immediately by the sheriff of Anne Arundel county upon the said Thomas, and that the said sheriff make return thereof.

From this order the said Thomas prayed an appeal to His Grace the Lord Archbishop of Canterbury in the Arches; and that he might have a copy of the aforesaid order to transmit to England.

16th October, 1707.—SEYMOUR, *Chancellor*.—Let the appeal be granted, as prayed; the said defendant performing, notwithstanding, the said order in all respects until such time as His Grace's answer to the appeal be had; whereof the defendant is to take notice at his peril.

On the 18th of October, 1707, the sheriff made return, that he had served the order on Thomas Macnamara, who said that he would not obey it, neither could the law or any one oblige him to it. Upon which, an attachment was issued, and after some efforts to oppose or evade the process, he was taken into custody, and brought before the court, and submitted to obey the order.—*Chancery Proceedings*, lib. P. C. fol. 579.

This appears to have been the first suit of the kind here, in Chancery, by a wife against her husband for alimony; of which it had been previously determined, that the county courts had no jurisdiction.—4 H. & McH. 477. It appears by the preamble of the act of 1718, ch. 16, (Parks' Laws of Maryland,) that this Thomas Macnamara, who had come into the province as an Irish papist, and afterwards declared himself to be of the church of England, was a practitioner of the law in several of the courts of the province, and had been sundry times suspended here, and in the province of Pennsylvania, for his misdeeds, and re-admitted here on his fair promises of amendment, under the authority of the act of 1715, ch. 48, s. 12. But having then on a late suspension from his practice, (for a full account of the very grossly offensive causes of which, see *Chancery Proceedings*, lib. P. L. fol. 397, 413,) obtained Queen Anne's order to be restored to it; and relying upon that royal order, as exempting him from the operation of the act of 1715, had treated the courts in the most indecent manner, despised their authority, and affronted their persons, which they had been cautious in punishing him for; being partly deterred by his great interest in England, and partly by his threatening, litigious, and revengeful temper, as well as his method of practising upon many unthinking people, to sur-

may hear and determine, all causes for alimony, in as full and ample manner, as such causes could be heard and determined by the laws of England, in the ecclesiastical courts there.' (x) Hence, I take it to be clear, that as the ecclesiastical courts of England would, in all cases of cruelty and adultery, pass a sentence of divorce *a mensa et thoro*, and grant alimony as a necessary and proper incident of such a sentence; or that the court of Chancery, after such a divorce, would award to the wife alimony, or a separate maintenance out of the husband's estate; (y) so here, although this court has no authority to pass any such sentence of divorce; or in any manner to meddle with the contract of marriage itself; yet, according to the provisions of this act, it cannot allow itself to receive any matter as a sufficient ground for granting alimony alone, which would not be a sufficient foundation in England, for granting a divorce *a mensa et thoro*, together with its incident alimony. (z)

prise them into certificates and affidavits in his favour, &c.; by which he had, at length, arrived to so intolerable a degree of pride and arrogance, that he had even attacked the governor himself in his character and government, and affronted the Governor and Chancellor publicly in the execution of his office, &c. &c. Whereupon, it was enacted, that Thomas Macnamara should be disabled from practising as an attorney or solicitor in any court of judicature of the province. And moreover, in general, that the magistrates should observe with strictness the demeanour of practitioners, &c. Dropping what related merely to Macnamara, the general provisions of this law were a short time after re-enacted, and yet remain in force, 1719, ch. 4.

(x) February, 1777, ch. 22, s. 14.—(y) *Oxenden v. Oxenden*, Gilb. Eq. Rep. 1; *Hobbs v. Hull*, 1 Cox, 445; *Ball v. Montgomery*, 2 Ves. jun. 195; *Duncan v. Duncan*, 19 Ves. 395.—(z) *Wallingsford v. Wallingsford*, 6 H. & J. 485.

LYNTHECUMB'S CASE.—This case was a bill filed by Jane Lynthecumb against Gideon Lynthecumb, her husband.

14th March, 1738.—OGLE, Chancellor.—Upon hearing counsel of both sides, it is Ordered, that the defendant pay unto the complainant after the rate of three thousand pounds of tobacco *per annum*, as a separate maintenance for her during the continuance of this suit, or until further order, if the estate of John Ford, late husband of the complainant, be left under the care and management of the defendant.

Some time after which, the case appears to have been again brought before the court.

December, 1739.—OGLE, Chancellor.—Upon motion of the complainant's counsel, it is Ordered, that the defendant do not take from the complainant her bed, bed-clothes, furniture to the bed, and her wearing apparel.—*Chancery Proceedings*, lib. J. R. No. 4, fol. 65, 146.

SCOTT'S CASE.—This bill was filed on the 20th day of August, 1746, by Mary Scott, against Andrew Scott. In which it is stated, that the plaintiff had been married to John Abington, who by his will appointed her his executrix, and soon after died seized and possessed of a very large real and personal estate, of which she ob-

Taking this to be the only correct ground upon which alimony should be awarded in any case by this court ; it follows, that in all

tained possession, and to the one-third of which she became entitled ; besides which she was seized in her own right of several parcels of land ; that, under these circumstances, she married the defendant, who thereupon took possession of all her personal estate and applied it to his own use ; and at his earnest persuasion, she joined in conveying all her real estate to persons named by the defendant, for the purpose of having it re-conveyed to him in fee simple ; that after she had thus put every thing out of her own power, the defendant began and continued to use her with so much cruelty and inhumanity, that she could not cohabit with him without running a manifest hazard of her life, and an utter loss of all peace and quiet ; that she was actually driven out of doors almost naked, and quite destitute of all the necessaries of life, and forced by him to fly for refuge and subsistence to her friends ; that he had declared he never would cohabit with her, but would allow her thirty pounds *per annum* as a separate maintenance, with which she would have been content ; but he has since refused to make her any allowance, and declared he would not allow her any thing unless he was forced to do so ; and that he is now actually about to depart from this province for some part of Europe, as appears by the annexed affidavit. Whereupon it was prayed, that the defendant might be compelled to make to the plaintiff a competent allowance and maintenance ; that she might have a writ of *ne exeat provinciam* against him, until the matter could be finally heard ; and that she might have such other relief in the premises as might seem meet, &c.

With this bill there was filed an affidavit of George Parker, in which he states, that upon a difference between the defendant and his wife, he had declared he would not cohabit with her, but would allow her thirty pounds a year as a separate maintenance ; after which he said he would allow her only twenty pounds, and then that he would not allow her any thing, unless he was forced to it ; that he had said he would depart the province in October next ; and that the plaintiff was destitute of any support, and had nothing except a negro wench and an old horse.

The defendant, by his answer, admitted his marriage with the plaintiff, but alleged that after the payment of the debts of the plaintiff's former husband, her third of his personal estate was very small ; that she had, as stated, conveyed to him a part of her real estate, but that it was in consideration of his relinquishing his interest in her dower to the children of her former husband, and of joining in conveyances to them of other parts of her real estate. This defendant denies that he ever used the plaintiff with cruelty or inhumanity, and avers that her behaviour was so indecent, abusive, and turbulent, occasioned by her common and frequent drunkenness, that he could not cohabit with her ; and was often obliged to leave his own home and go to a neighbour's to be out of her way ; that he had, however, resolved to bear with her, and had continued to do so, until he became convinced that she had been guilty of the greatest crime a wife can be guilty of to a husband, and had thereby brought a foul disease upon him ; when he told her he could no longer cohabit with her. He denies that he ever drove her out of doors, but told her she might go and live where she pleased, and he would allow her thirty pounds a year ; and she accordingly went away, taking with her all her clothes, a negro woman, and a horse, saddle and bridle.

October, 1747.—OGLE, Chancellor.—This case standing ready for hearing upon the bill and answer, the solicitors of the parties were heard, and the proceedings read and considered. *Decreed*, that the defendant pay unto the complainant thirty pounds current money yearly and every year, from the 20th day of August, 1746, during the joint lives of both parties, unless they shall be reconciled, and mutually

such cases, the wife must shew, either that her husband has been guilty of adultery, or cruel treatment of her. What is cruelty, it

agree to cohabit together; and in case of such reconciliation and cohabitation, the said payment to cease for the time to come, after such reconciliation, agreement, and cohabitation. And it is further *Decreed*, that the said Andrew Scott, on or before the last day of November, in this present year, give good security, to be approved of by this court, for the payment of the said thirty pounds yearly and every year, as the same shall become due, to the use and separate maintenance of the said Mary, the complainant. And it is likewise *Ordered*, that the defendant pay to the complainant the cost of this suit by her in this cause laid out and expended. — *Chancery Proceedings, lib. J. R. No. 5, fol. 237.*

GOVANE'S CASE.—This bill was filed on the 30th day of October, 1750, by Anne Govane, by Charles Hammond, her father and next friend, against William Govane. The bill sets forth that the plaintiff, in the year 1740, being possessed of a personal estate to the value of £700 and upwards, and entitled to dower as the widow of Thomas Homewood, deceased, in several very valuable tracts of land, married the defendant, by virtue whereof he possessed himself of her personal estate and dower, and has thereby greatly increased his fortune. That he is of such a perverse, turbulent, and violent temper, that she has for some years past lived a very uneasy life with him, not only from the vile and abusive language with which he has treated her, but from several cruel and unprovoked beatings and whippings she has causelessly received from him; that from the threats he had uttered against her with a drawn sword, and other such destroying weapons in his hands, she was obliged in September, 1749, to leave his house; and for the preservation of her life, which she apprehended to be in great danger from his malice, to swear the peace against him. Soon after which, by the mediation of friends, and upon his fair promises of kindness and moderation for the future, she returned to his family, and behaved herself as a dutiful and obedient wife. But he has since, without the least provocation or cause, violently abused her, and repeatedly threatened to kill her, and thereby forced her from his house; and threatens that he will revenge himself of her by selling all his estate and her dower interest, and carrying the proceeds to Rhode Island, where he has declared he very soon intends to go, so as to leave her utterly destitute of any support or maintenance; that he has warned several storekeepers not to trust her, with a malicious view of exposing her, contrary to all truth, as an expensive wife, and thereby offering a pretence for his many acts of cruelty towards her, or of depriving her of the common necessities of life. Whereupon it was prayed, that a separate maintenance might be awarded to her, suitable to his circumstances and the estate she brought him; and that he might, by a *ne exeat provinciam*, be prevented from leaving the province without the leave of the court, and to her prejudice. The plaintiff Ann made an affidavit before a justice of the peace of the truth of the facts thus set forth in her bill.

The defendant put in his answer, in which he admits their marriage, but avers that her personal estate was not so valuable as she alleged, and so far from increasing his fortune from the profits of her estate, the whole, consisting principally of negroes and her dower, could not be made to clear itself, but had actually brought him annually in debt; that soon after their marriage he discovered she had an exceedingly jealous disposition, insomuch so that no woman, even a relation or a white servant, could come into his company without exciting her jealousy; in consequence of which he made it his business to tarry at home, and when called abroad to return at night. That in April, 1749, in a jocular conversation in the hearing of the plaintiff, between

is often difficult to determine. It seems however, to be admitted, that personal injury, and words of menace, importing the danger of

him and a woman in the neighborhood, who had bantered him for being intimate with a certain woman since dead, the plaintiff was thereupon seized with so implacable a jealousy and hatred against him, that notwithstanding his many asseverations of his innocency, she treated him with the most opprobrious and scurrilous names, and continued to do so for many months.—[*Govane v. Govane*, 1 H. and McH. 346.] That however perverse and turbulent his temper may be, which he does not admit, it cannot be more so than her's with regard to him and all about her; that whatever weakness of temper he may have, he has nothing of rigour, severity, or cruelty in his nature, and never treated her with any vile or abusive language, but when she was most flagrantly the first aggressor, or laid hands on her but on just provocation and absolute necessity, when she committed the first assault, of which, were it proper, he could produce such instances as would astonish this court and all mankind. That in the summer of 1749, upon any difference happening between them, she frequently in the night left his house and went to that of his overseer's, or to that of his overseer's father's, where she was kept, and spirited up to take the most violent steps to the dishonour of herself as well as of this defendant. That in September of the same year, she swore the peace against him; in consequence of which he was made to enter into a recognizance with sureties, from which he was afterwards discharged, and by the mediation of friends and mutual promises of reconciliation, she returned to live with him; that afterwards, when he was extremely sick and unable to help himself, she used him with the utmost cruelty, and expressed a hope that his then sickness would carry him off, and wished he might be in hell with his whores. That afterwards he was informed, and from various circumstances had strong reason to suspect and believe, that she had some improper and illicit intercourse with his overseer; upon which he mildly remonstrated with her, and proposed to her that they should go and reside for a time in Rhode Island, until the scandal should die away, which she refused to do. Whereupon the next day he discharged his overseer, when she being present, without being spoken to or receiving the slightest provocation, walked off to the house of the overseer's father, where she remained about ten days, and then went to the house of her own father, where she has since chiefly resided. He denies that he ever threatened her with a drawn sword, or any other weapon, or obliged her to leave his house; and also denies that he ever intended, or does now intend, to leave this province. He admits that he had warned several storekeepers not to trust her, and will not pay any thing for her while she continues to live separate from him; but he proposes to receive her again, and declares his readiness now to be reconciled to her, and again to cohabit with her, &c.

To this answer the plaintiff put in a general replication, upon which a commission was issued, and a great many depositions were taken and returned.

28th July, 1752.—*TASKER, Chancellor*.—This case standing ready and coming on to be heard accordingly, in presence of counsel on both sides, and the whole proceedings being read, appeared to be as before recited and set forth; whereupon, and upon reading the bill, answer, and depositions, taken and published in this cause, and also the account of Thomas Homewood, deceased, late husband of the complainant, his estate, as settled in the Prerogative court of this province, by which it appears that the complainant's dividend of her said late husband's personal estate, was £6 9s. 8d. gold and silver currency, and £692 19s. 2d. current money of Maryland; and upon debate of the matter, and hearing what could be alleged on both sides, this court doth accordingly *Decree*, that the defendant pay unto the complainant the sum of £163 11s. current money, which is in proportion to £92 current money

actual bodily harm, may be deemed cruel treatment, but not mere rudeness of language. (a)

per annum, for her support and maintenance, from the commencement of this suit until this present time. And it is further *Decreed*, that the defendant pay the complainant £92 for her separate maintenance on the last day of August, yearly, and every year, until they shall mutually agree to cohabit together. And the complainant, by her counsel, offering to accept of her dower in the lands her said late husband died seized of, and which the defendant is, in right of the complainant, possessed of or entitled unto, at the value of £50 current money *per annum*, to be allowed out of such annual sum as the defendant should be decreed, by this court, to allow the complainant for alimony or separate maintenance; therefore, if the defendant will give up and surrender by deed under his hand and seal to Col. Charles Hammond, in trust, for and to the use of the complainant the lands which the defendant holds in right of the complainant as her dower of the lands which her former husband Thomas Homewood was seized of, that the use and occupation thereof shall be deemed as a satisfaction for £50 *per annum* of the said £92 *per annum*. And that, moreover, the defendant give sufficient security in the penalty of £700 current money, to the said Charles Hammond, in his own name, but in trust for the complainant, to pay to the complainant, or to the said Charles Hammond to the use of the complainant £42 current money on the last day of August, yearly, and every year, until the complainant and defendant shall agree to cohabit together; the first payment to be made the last day of August, seventeen hundred and fifty-three. But in case the defendant will not surrender and give up the said land, on or before the last day of August, that then the defendant do pay the complainant the aforesaid £92 currency on the last day of August, yearly, and every year, until they shall mutually agree to cohabit together; the first payment to be made on the last day of August, seventeen hundred and fifty-three; and give sufficient security in the penalty of £1,500 current money, to the said Charles Hammond in his own name, but in trust for, and to the use of the complainant. And that the defendant do pay all the costs of this suit.

After which the case was again brought before the court for further directions as to costs.

14th August, 1752.—*TASKER, Chancellor*.—It is *Ordered*, that the attendance of the commissioners in the execution of the commissions issued in this cause, and also of the clerk to the said commissioners, and their expenses be settled by the register of this court, and that the complainant and defendant immediately pay each of them one-half of the said charge; and that the money to be paid to the commissioners and clerk wait the event of this suit.

Immediately after which, the defendant prayed an appeal, upon which the case was again submitted.

14th August, 1752.—*TASKER, Chancellor*.—Upon motion this day of the defendant's counsel for an appeal in this cause, and lodging a bond in court for the prosecution of the said appeal, and upon hearing the arguments of the counsel on both sides, this court hath thought fit, and doth accordingly *Order*, that an appeal be

(a) *Harris v. Harris*, 1 Eccles. Rep. 204; *Waring v. Waring*, 1 Eccles. Rep. 210; *Evans v. Evans*, 4 Eccles. Rep. 310; *Oliver v. Oliver*, 4 Eccles. Rep. 429; *Kirkman v. Kirkman*, 4 Eccles. Rep. 438; *Holden v. Holden*, 4 Eccles. Rep. 452.

In this case, there is no evidence of either adultery or any such cruelty, as can entitle the plaintiff *Anna*, to alimony, properly so

granted. And notwithstanding which, as the defendant is obliged by law to support the complainant his wife, and that she has no other support but what he ought to provide for her, and that without such provision she must be destitute of the necessities of life: it is therefore *Ordered* by this court, that notwithstanding the said appeal, the defendant pay the sum of £163 11s. 0d. current money to the complainant, and the sum of £92 current money *per annum*, according to the decree, until the appeal shall be determined.

Some time after, the parties having come to an agreement in relation to the matter in controversy, again submitted their case.

31st October, 1752.—*TASKER, Chancellor.*—Forasmuch as this court is this present day informed, as well by the complainant's counsel as the defendant's counsel, that since the decree made in the above cause, and since the granting an appeal from the said decree, that the complainant and defendant have come to the following agreement, *viz.* that the defendant shall pay the sum of fifty pounds current money immediately to the complainant; and also, that the defendant shall pay the sum of forty pounds current money to the complainant on the last day of August next; and the sum of twenty pounds current money *per annum*, on the last day of August yearly and every year afterwards, until the complainant and defendant shall mutually agree to cohabit together; and that the defendant shall convey and make over by deed, under his hand and seal, to Col. Charles Hammond, in trust for and to the use of the complainant, the lands which the defendant holds in right of the complainant, as her right of dower of the lands which her former husband, Thomas Homewood, was seized of; and that he the defendant shall give sufficient security, in the penalty of four hundred pounds current money, to the said Charles Hammond, in his own name, but in trust for the complainant; to pay to the complainant the sum of forty pounds current money on the last day of August next; and also the sum of twenty pounds current money *per annum*, yearly and every year, after the last day of August next ensuing; and that the defendant shall immediately pay all the costs of the said suit; and that the complainant shall accept of the same in lieu of what was decreed her by this court for alimony, or separate maintenance. And it being prayed by both complainant and defendant, that the said agreement may be made the decree of this court, it is therefore, by the mutual consent of the complainant and defendant, *Decreed*, that the defendant pay to the complainant immediately the sum of fifty pounds current money, and that the defendant also pay to the complainant the sum of forty pounds current money, on the last day of August next; and also, the sum of twenty pounds *per annum* on the last day of August, yearly and every year afterwards, until the complainant and defendant shall mutually consent and agree to cohabit together; and that the defendant convey and make over by deed, under his hand and seal, to Col. Charles Hammond, in trust for and to the use of the complainant, the lands which the defendant holds in right of the complainant, as her right of dower of the lands of her former husband Thomas Homewood was seized of; and that the defendant give sufficient security, in the penalty of four hundred pounds current money, to the said Charles Hammond, in his own name, but in trust for the complainant; to pay to the complainant or the said Charles Hammond, for the use of the complainant, the said sum of forty pounds current money, on the last day of August next; and also, the sum of twenty pounds current money *per annum*, yearly and every year, after the said last day of August next ensuing; and that the defendant immediately pay all the costs of the said suit; and that the complainant accept of

called, and upon the grounds to which this court seems to have been confined by the act of assembly; even supposing it had been shewn, that *Lewis Helms* had any species of property, out of which a separate maintenance of this kind could be assigned to his wife.

But where a married woman has been ill-treated, abused, or abandoned by her husband, and left without the means of subsistence, a provision or separate maintenance may be secured to her by the Court of Chancery, out of her own fortune, which happens to be within reach of the court. The ground upon which this is done is, that as the interest of her fortune is intended for both of them, and is given to him by the laws, upon the tacit condition that he maintains her, if he either will not maintain her, or so demeans himself, that she cannot with safety or decency consort with him, to receive a maintenance at his hands, that interest shall be taken from him and given to her; since it would be very hard, that the party from whom the fortune moves should lose, and the other gain the whole; and that too, by his own misconduct. This pro-

the same in lieu of what was decreed to her by this court for alimony or separate maintenance. But, forasmuch as Edward Dorsey, of the city of Annapolis, present in court, offers in lieu and behalf of the said defendant, to become chargeable to the said complainant with the payment of the sum of twenty pounds, part of the aforesaid sum of forty pounds current money on the last day of August next, and with the further annual payments of the several sums of twenty pounds current money upon the last day of every August thence ensuing, until the complainant and defendant shall mutually consent and agree to cohabit together; and offers to give sufficient security for the performance thereof, which the said Charles Hammond, the complainant's next friend, agrees to accept of, and that the defendant may be discharged of so much of this decree against him as the aforesaid Edward Dorsey has undertaken to pay. Therefore, it is *Decreed*, that if the said Edward Dorsey give good security in the penalty of six hundred pounds current money to the said Charles Hammond in his own name, but in trust for the complainant, to pay to the complainant or to the said Charles Hammond to the use of the complainant, for and towards her separate maintenance, the sum of twenty pounds, part of the said sum of forty pounds, on the last day of August next, and to make the further annual payments of the said several sums of twenty pounds current money on the last day of every August then ensuing, during the joint lives of the complainant and defendant, or until the complainant and defendant shall mutually consent and agree to cohabit together; that then the said security so given shall be deemed and taken, so far, for the said twenty pounds, part of the said forty pounds, and for the said several annual payments of twenty pounds, to be paid on the last day of every August thence next ensuing, during the joint lives of the complainant and defendant, or until the said William Govane and Ann his wife shall mutually consent and agree to cohabit together, in lieu and discharge of such part of the foregoing decree against the defendant.—*Chancery Proceedings, lib. J. R. No. 5, fol. 820.*

vision for the wife, made by the court, out of her own fortune, is always a present income during the husband's life; and being intended to relieve her immediate necessities, is made payable to her separately and distinctly from her husband. But she cannot anticipate it by sale or incumbrance; because it continues only until the husband returns to his duty, and conducts himself towards her as he ought. In cases of this kind, the husband may be ordered to pay something towards the support of his wife, even pending the suit; and this is not considered as making a decree before the hearing; but only doing what the husband himself is obliged to do; maintain his wife until the case can be heard upon the merits. Thus guarding the wife against the possibility of future danger, and applying a remedy for her present wants. (b)

There is yet another occasion afforded by the nature of the wife's title to property, of which the court avails itself to interpose its authority, against the legal claim of the husband; that is, when the husband requires the assistance of this court, to procure the possession of any part of his wife's fortune, it will be refused to him, unless he makes a provision for her out of it, or shews that he has purchased it by having already adequately provided for her; or that it is of too small an amount to have any provision made out of it. (c) This peculiar claim is emphatically called 'the wife's equity.' (d) It extends to all her equitable *choses in action*, and generally, to all equitable estates or interests falling within the jurisdiction of a Court of Chancery; but not to mere legal *choses in action*, to terms for years, or any chattel of which the husband may legally take possession. The habit of the court has always been, of itself, and without any application previously made by the married woman, to direct an inquiry, when money has been carried over to her account, whether any settlement has been made; and, if none has

(b) *Oxenden v. Oxenden*, 2 Vern. 493; *Sleech v. Thorington*, 2 Ves. 560; *Watkins v. Watkins*, 2 Atk. 96; *Bond v. Simmons*, 3 Atk. 20; *Head v. Head*, 3 Atk. 295; *Ball v. Montgomery*, 2 Ves. jun. 192; *Legard v. Johnson*, 3 Ves. 352; *Wright v. Morley*, 11 Ves. 12; *Duncan v. Duncan*, 19 Ves. 395; S. C. Coop. Rep. 254; *Cooke v. Cooke*, 1 Eccles. Rep. 178; *Otway v. Otway*, 1 Eccles. Rep. 203; *Smith v. Smith*, 1 Eccles. Rep. 220; *Rees v. Rees*, 1 Eccles. Rep. 418; *Street v. Street*, 2 Eccles. Rep. 195; *Smyth v. Smyth*, 2 Eccles. Rep. 293; *Cox v. Cox*, 2 Eccles. Rep. 531; *Hamerton v. Hamerton*, 3 Eccles. Rep. 17; *Harris v. Harris*, 3 Eccles. Rep. 153; *Hawkes v. Hawkes*, 3 Eccles. Rep. 231; *Kempe v. Kempe*, 3 Eccles. Rep. 233; *Purcell v. Purcell*, 4 Hen. & Mun. 507; *Hewitt v. Hewitt*, 1 Bland, 101.—(c) *Jernegan v. Baxter*, 6 Mad. 32; *Foden v. Finney*, 3 Cond. Chan. Rep. 739.—(d) *The State v. Krebs*, 6 H. & J. 36.

been made, to direct a settlement not upon the wife only, but upon the children also. (e)

To obtain the benefit of this equity the wife may come in and make her claim in any suit instituted by her husband; or she may by her next friend file a bill against him or his legal assignees in bankruptcy or insolvency; for neither the husband, nor any person standing in his place can have her fortune, without making a provision for her. The wife's equity is a mere creature of this court; and is therefore never allowed, as between citizens of other states, according to the laws of which the wife is allowed no such equity. (f) It is a claim founded upon natural justice; it resembles the paternal care which a Court of Chancery exercises for the benefit of orphans; and assuming the place of a parent, the court requires a settlement upon the wife, upon the presumption that it demands no more than would have been insisted on by a prudent father. But the court uses no active means of enforcing such a settlement; it only proposes to him who asks equity, that he should do equity; and therefore, the husband cannot be obliged to make a settlement upon his wife. If he does not require the possession of his wife's fortune, he must be allowed to receive the interest of it so long as he maintains her; and to have the chance of taking the whole by survivorship. The wife's equity is, in general, a provision made for her and her children of the marriage, to take effect after the death of the husband; but if the husband be insolvent, then the maintenance provided for her, is always a present one, and made to commence immediately; because the husband being under an obligation to maintain his wife, and his doing so, being the condition upon which the law gives him her property; therefore, his incapacity to maintain her, owing to his insolvent condition, gives her an equitable right to claim an immediate provision for her own support. And where the incapacity of the husband to maintain his wife, arises from bankruptcy or legal insolvency, the court fastens that obligation upon the property itself. (g) This settlement is commonly made under the direct authority of the court; but that is not indispensably necessary; for if it be voluntarily made under circumstances in which it would have been ordered by the court it will be sustained. And all such

(e) *Murray v. Elibank*, 13 Ves. 1.—(f) *Dues v. Smith*, 4 Cond. Chan. Rep. 257.—(g) *Aquilar v. Aquilar*, 5 Mad. 414.

settlements are deemed valid even against the creditors of the husband. (*h*)

Here the wife claims the whole of this residuary legacy, to be settled upon her to her own exclusive use. There can be no doubt that she must have a provision made for her to take effect immediately; and that upon the two last mentioned grounds of equity. *First*, because it is admitted that this legacy was given to her; and it appears that her husband has treated her ill, has taken up his residence in another state, and has left her entirely destitute of any aid from him. And *secondly*, even supposing no separation had taken place, and that he was living with her in harmony, she is entitled, upon the ground of 'the wife's equity,' to a present provision; because of its having been admitted and shewn that the legacy is hers, and that he is utterly insolvent. Her claim to some provision is, therefore, sustained by the clearest proofs and the most sound and best established principles of equity.

But, in cases of this kind, where, as in this instance, it has been submitted entirely to the court, to determine what provision shall be made, the husband has been almost always invited to make proposals of terms to be approved or rejected by the court, as to how much the wife shall have, and, in determining that, the court has exercised a discretion without being tied down to any precise rule. But it seems now to be the general opinion that the court will not of itself give the whole to the wife. (*i*)

In England it is considered, that in all cases where an *infant*, male or female, has been by any suit brought before the Court of Chancery for the purpose of having the person or estate of such infant properly disposed of, such infant thereby becomes, until the attainment of full age, a ward of the court, and may be governed and protected accordingly. Hence, where a female infant, who had thus become a ward of the court, was married in contempt of

(*h*) *Moor v. Rycault*, Prec. Cha. 22; *Nicholas v. Nicholas*, Prec. Cha. 546; *Brown v. Elton*, 3 P. Will. 202; *Sleech v. Thorington*, 2 Ves. 561; *Jewson v. Moulson*, 2 Atk. 419; *Middlecome v. Marlow*, 2 Atk. 520; *Bond v. Simmons*, 3 Atk. 20; *Salisbury v. Newton*, 1 Eden, 370; *Pryor v. Hill*, 4 Bro. C. C. 139; *Burdon v. Dean*, 2 Ves. jun. 607; *Langham v. Nenny*, 3 Ves. 469; *Macaulay v. Philips*, 4 Ves. 15; *Franco v. Franco*, 4 Ves. 528; *Blount v. Bestland*, 5 Ves. 515; *Elibank v. Montolieu*, 5 Ves. 737; *Glaister v. Hewer*, 8 Ves. 206; *Murray v. Elibank*, 10 Ves. 84; *Elworthy v. Wickstead*, 1 Jac. & Walk. 69; *Elliott v. Cordell*, 5 Mad. 150; *Beams' Orders*, 464; *Deeks v. Strutt*, 5 T. R. 690.—(*i*) *Vandenanker v. Desbrough*, 2 Vern. 96; *Adams v. Pierce*, 3 P. Will. 12; *Ex parte Coysegame*, 1 Atk. 192; *Beresford v. Hobson*, 1 Mad. Rep. 363.

its authority; and especially if it appeared that the husband had nothing to settle, and was a beggar, marrying her for the sake of her fortune, the court has been in the habit of not permitting him to touch that fortune, which was his sole object, and of having the whole settled upon the wife. (*j*)

In this instance the plaintiff *Anna* can, in no sense, be considered as a ward of this court, and, therefore, nothing of the nature of a contempt of the court can be imputed to her husband. Yet, those cases, in relation to wards of court, may be adduced to shew that the court, under some peculiar circumstances, allows itself to take into consideration the sinister views and objects of the husband in marrying his wife; and if the court can be satisfied that he was actuated chiefly or altogether by sordid motives; that he married the woman merely to come at her fortune, it will interpose to save the wife from such most grievous of all frauds, and have her whole fortune settled upon her exclusively. For, in those cases, there is nothing so very peculiar in being a ward of court; it is not so much upon the ground of any species of contempt or affront to the court itself; it is the corrupt motives of the husband; the fraud and delusion practised by him upon frankness and innocence, which affords the strong ground upon which the court plants its equity in directing the whole of the wife's fortune to be settled upon her exclusively.

Here there is no direct proof of a fraudulent and corrupt intention on the part of *Lewis Helms* to marry this plaintiff *Anna* merely as a means of getting her fortune into his hands; but there are circumstances in the case which go far to shew that his motives were, by no means, as correct as they ought to have been. Her age; the pecuniary situation of the parties; the plan he formed so soon after marriage, although an ignorantly contrived one, to have the legacy transferred to him by a power of attorney, and a will executed by his wife; her refusal; the open rupture that soon followed, and the disclosure, from his papers, of his bad character, are facts which, when taken together, it will be difficult to reconcile with any other than sordid motives on his part.

I have met with no instance where the wife was not a ward of the court, in which the whole of her fortune has been settled on her, merely on the ground of the fraudulent or base motives of the

(*j*) *Butler v. Freeman*, Amb. 302; *Wells v. Price*, 5 Ves. 398; *Ball v. Coutts*, 1 Ves. & Bea. 303.

husband, and her having been deluded into a marriage for the sole purpose of enabling him to get hold of her property. But if, as has been said, this court has the power to go so far as even to declare the contract of marriage itself to be null and void, on the ground of its having been procured by terror, abduction, and fraud; (*k*) it would not be consistent with itself, and faithful to its best principles, if it were not to allow itself, under such circumstances as are here presented, to deal out to the wife a liberal and saving measure of justice; and, as the only means of preventing the deceiver from profiting by his delusion, to have the whole of her fortune settled upon her exclusively.

Let it, however, be supposed that *Lewis Helms*, in contracting marriage with his present wife, was actuated by no improper or unworthy motives; or that, even if he was, they cannot be allowed to form any sufficient reason for stripping him of the whole of this legacy, and that it is impossible the court should undertake, of itself, to give the whole to her; because it cannot assume or admit the position, that a married woman is entitled to the whole of her separate property to her separate use, in direct opposition to the clearest principles of the marriage contract. Yet the husband, at least, is in a condition to bind himself by his own voluntary consent; and, therefore, although the court itself cannot divest him wholly of his marital rights, yet he himself may freely release them; and if he does do so, such relinquishment may be received, ratified, and cast into the shape of a settlement, by the court, for the benefit of the wife and her children.

Where it appeared that the wife was entitled to a large legacy; that she had been clandestinely married; that the husband, after the marriage, had made a settlement equal to the whole amount upon her, and that in consideration thereof, the trustees had paid the legacy to the husband; it was held that the settlement of the whole, by the agreement and consent of the husband, was binding and good even against his creditors. (*l*) And where the husband had given a note to his wife, that if he should treat her ill, she should have her share of her mother's estate to her own use. It was conceded that such a consent of the husband would have been sufficient as to the amount; and that the whole might have been settled upon the wife. (*m*) And where property had been be-

(*k*) *Ferlat v. Gojon*, 1 Hopk. Rep. 478.—(*l*) *Moor v. Rycault*, Prec. Cha. 22; *Wheeler v. Caryl*, Amb. 121.—(*m*) *Nicholls v. Danvers*, 2 Vern. 671; *Rodney v. Chambers*, 2 East. 283.

queathed to the wife of the bankrupt for life; and it was claimed by the assignees of her husband; the court made a reference to receive proposals from the husband for a settlement on his wife, and he proposed that the whole should be settled on her, which was ordered accordingly. It was said that there was a want of form in calling for proposals from the bankrupt husband; because he, of course, would propose that the whole should be given to his wife, rather than any part to his assignees, and that the assignees must have consented to the arrangement. (n) And it is sufficient that such consent of the husband be expressed in any clear and distinct form, either before or after the institution of the suit. As where the husband, upon whose consent the quantum depended, had, in a letter to a third person, expressed a desire that the whole might be settled, it was held to be an honest, conscientious, and absolute appropriation of the whole fortune, and a settlement of the whole was decreed accordingly. (o)

From all which it appears to be well established that the husband, or his assignees, who stand in his place, may consent that the whole fortune shall be settled on the wife, and that if such consent be freely and deliberately given in any form, the court will hold the husband's interest bound by it, upon the ground that such agreement, without at all conflicting with the sacred principles and policy of the marriage contract, comes in aid of the equity which gives her a provision out of her own fortune, when she is not maintained by her husband; and also in aid of 'the wife's equity,' which are now admitted, on all hands, to be wholesome and useful modifications of the rigid rules of the common law, and because such consent merely reduces to certainty that, as to which the court had the power to exercise a just and liberal discretion.

In this case the agreement of the 29th of August, 1823, between *Lewis Helms* and *Anna* his wife, so far as it declares the marriage contract to be dissolved, must be regarded as a nullity. But it is now well settled, that agreements of this description may be entirely void as to part, and valid as to the rest. If a husband and wife enter into articles of agreement to separate, and that she shall have a separate maintenance, the agreement to live apart is void; but the stipulation to pay a separate maintenance is legal, and may be enforced; and in many situations, husband and wife may treat together, provided they treat fairly. Here the subject of

(n) *Beresford v. Hobson*, 1 Mad. Rep. 363.—(o) *Grosvenor v. Lane*, 2 Atk. 180.

this treaty between the parties was fair and honest; and whatever might have been the sufferings of *Lewis Helms* during his imprisonment for debt in the jail of Baltimore county, or however that suffering might have been brought upon him, there is not the slightest proof, that he was, as has been alleged, under any duress, apprehension of harm, or mistake, as to the nature and object of the agreement of the 29th of August, 1823, at the time it was signed by him. That instrument, on his part, was his unconstrained voluntary act, done with a full knowledge of all the facts, and of all his legal rights. By which writing he says, that he 'doth bind himself to renounce all the claim he has against his wife *A. G. M. Helms*, as well as the claim he might have against the estate of her deceased brother *Carsten Newhaus*.' Now the only sound and sensible construction, that can be given to this agreement, compatibly with the full existence of the marriage contract, which the parties themselves cannot dissolve, is, that the husband has thereby consented, that his wife's whole fortune shall be settled upon her, to the use of herself, exclusively of her husband as fully as may be, in all respects whatever. It is in this light, that I view this agreement. I take it as an explicit consent given by him, that his wife's whole fortune may be settled upon her, and I shall decree accordingly.

But the plaintiff *Anna* had one son, an illegitimate child, born before her marriage with *Lewis Helms*. Can he be allowed to benefit by the proposed settlement? This is the next point to be considered.

It is a general rule, that in making provision for the wife, the court extends it to the children of the marriage; and, in many cases, it is extended to the children of the wife by that or any other marriage. And although the wife may, at any time after her share has been ascertained, (*p*) come into court and relinquish her right, founded on what is called 'the wife's equity,' yet subject to her release, her children acquire a vested interest in the provision, directed to be made, from the date of the order; so that if she dies after that period, without releasing it to her husband, they may, notwithstanding, come in and have the settlement perfected for their benefit. (*q*) In a settlement directed to be made, upon a

(*p*) *Jernegan v. Baxter*, 6 Mad. 32.—(*q*) *Murray v. Elibank*, 10 Ves. 90; *S. C.* 13 Ves. 5; *Lloyd v. Williams*, 1 Mad. Rep. 449; *Fenner v. Taylor*, 6 Cond. Cha. Rep. 453.

ward of the court, where the husband has been guilty of any fraud or gross misconduct, the fortune is always confined to the wife and her children by that, or any other marriage; and even where there was strong reason to believe, that one of the two children of the wife was illegitimate, as the court could not enter into that question, the settlement was made upon the wife and both the children. (r)

The English books, in reference to this subject, must be understood, however, as always speaking of legitimate children, who are capable of taking by descent. According to the law of England a bastard is, in many respects, considered as the son of no one; and particularly as to the right to take by descent or distribution. He is reckoned as a *terminus a quo*; the first of his family; he can, therefore, for most civil purposes have no heir or next of kin but the legitimate issue of his own body. But, in some other respects, and for all moral purposes his consanguine relations are regarded; for it has been held, that in the Court of Chancery a more liberal allowance for the maintenance of an infant may be approved, in consideration of the circumstances of an illegitimate brother born of the same father and mother who was unprovided for. (s) And so too a bastard cannot marry his mother or illegitimate sister. (t) By the civil law, spurious children are allowed to take as heirs and next of kin of their mother equally with those who are legitimate; and, claiming under the mother, they are, in general, entitled to the same rights as legitimate children. (u) These principles of the civil law have been sanctioned and adopted as a part of our code by an act of assembly which declares, that the illegitimate children of a *female* shall be capable of taking and inheriting both real and personal estate from their mother, or from each other, or from the descendants of each other in like manner as if they had been born in lawful wedlock. (w)

Whence it is clear, that on the death of the plaintiff *Anna* intestate, while sole, her illegitimate son *Frederick* would take as if he had been born in lawful wedlock; and therefore, upon those principles by which this subject is governed, I am of opinion, that he, as the inheritable, though bastard child of the plaintiff *Anna*, ought to be allowed to participate in the benefit of the settlement about

(r) *Millet v. Rowse*, 7 Ves. 420; *Ball v. Coultis*, 1 Ves. & Bea. 301.—(s) *Harvey v. Harvey*, 2 P. Will. 21; *Bradshaw v. Bradshaw*, 1 Jac. & Walk. 627.—(t) *The Queen v. Chafin*, 3 Salk. 66; *Haines v. Jescott*, 5 Mod. 168; S. C. *Ld. Raym.* 68.—(u) *Stevenson v. Sullivan*, 5 Wheat. 207, 262, note; *Just. Inst. by Coop.* 568.—(w) 1825, ch. 156.

to be made upon his mother. Because it is evident, from the general spirit of the cases in relation to this subject, that the fortune of the wife is settled upon her and her children, looking to her blood, and confining the descent or distribution to those who would lawfully take from her as her immediate descendants. This bastard son *Frederick* is a child who, upon those principles, would take according to our law; and consequently, the settlement upon the plaintiff *Anna* must be extended to her son *Frederick*, and to any other child or children of her's, who may, by the law of Maryland, take, as such, from her.

A settlement of this kind, is the peculiar creature of equity; the chief purpose of it is to save a married woman from the evil consequences of the misconduct, negligence, or misfortune of her husband. And, as in this instance, there is much reason to believe, that the wife may stand in need of all the safeguards the court can place about her; I shall limit her power of alienation, during coverture, by directing the rents and profits or income only, of the amount to be invested for her separate use, to be paid to her from time to time, and not by anticipation; so that she may not, by any undue influence, be deprived of that means of support, which it is the intention of the court to have most effectually secured to her. (x)

The claims of *Sumwalt* and *McFarren*, and of *Flagler*, only remain to be disposed of.

It is well settled, that a married woman is fully competent to come into this court and make a valid release of whatever she may be entitled to have awarded to her, upon the ground of 'the wife's equity;' and consequently, this plaintiff *Anna*, must be held, by this her bill, to have completely released all her claims and pretensions to the full extent of the mortgage or assignment of such her interest to *Sumwalt* and *McFarren*; and her husband *Lewis Helms*, having by his answer expressly admitted the validity of their claim, the whole of it, principal and interest, must be decreed to be paid to them, when the amount shall have been stated by the auditor.

With regard to *Flagler's* petition, as he does not pretend to give his claim any other or stronger foundation, than that of an assign-

(x) *Parkes v. White*, 11 Ves. 210; *Brandon v. Robinson*, 18 Ves. 429; *Jackson v. Hobhouse*, 2 Meriv. 486; *Barton v. Briscoe*, 4 Cond. Cha. Rep. 283; *Woodmeston v. Walker*, 6 Cond. Cha. Rep. 457; *Jones v. Salter*, 6 Cond. Cha. Rep. 463; *Brown v. Pocock*, 6 Cond. Cha. Rep. 464.

ment from *Lewis Helms*, after the 29th of August, 1823; and as *Lewis Helms* could not after that time, when he had consented to the settlement of the whole upon his wife, have been, nor cannot now be allowed to take any part of this legacy; *Flagler*, who only claims under him, cannot be permitted to take any part of it. And consequently, without saying any thing of the propriety of *Flagler's* petition, in other respects, it is perfectly evident that it must be dismissed with costs.

Whereupon it is *Decreed*, that the said executors, *John Franciscus* and *Philip B. Sadtler*, account with *Anna G. M. Helms* and *Lewis Helms*, her husband, of and concerning the personal estate of the late *Carsten Newhaus*, including as a part of the said residuary legacy, so much of the personal estate as was given by the last will of the late *Carsten Newhaus*, to *Betsy A. Bauers*, — *Bauers*, *Henry A. Bauers*, and *John D. Bauers*, the four supposed children of the testator's sister, — *Bauers*, of Bremen, who never did in fact exist, by reason whereof the legacies so given to them, are void, and have become a part of the said residuary legacy. And the auditor is hereby directed to state the account in relation thereto; and also an account of the sums now due, if any, to each one of the existing specific legatees; and of the sum due, if any, to the residuary legatee, after deducting therefrom the principal and interest of the debt due to *Joseph Sumwalt* and *John McFarren*. The said several accounts to be stated by the auditor from the proceedings and proofs now in the case, and from such other proofs as may be laid before him. And the parties are hereby authorized to take testimony in relation to the said several matters of account, before the commissioners in the city of Baltimore, or before any justice of the peace, on giving three days' notice as usual; provided, that the said testimony be taken and filed in the Chancery office, on or before the third day of August next.

And it is further *Decreed*, that the whole of the said residuary legacy, after deducting therefrom the claim of *Sumwalt* and *McFarren*, be invested and settled in trust, so that the annual rents and profits, interest and dividends, be paid from time to time, and not by way of anticipation, to the said *Anna G. M. Helms*, to her sole and separate use, during her life, and apart from her husband, *Lewis Helms*. And if she dies in the life-time of the said *Lewis Helms*, then the whole to go according to her appointment by will; and in case she makes no such appointment, then the whole to go to her child, children or next of kin,

who, by the law of this state, are capable of taking as such from the mother. And if the said *Anna G. M. Helms* should survive her husband, *Lewis Helms*, then the whole of the said residuary legacy to vest in her, absolutely free and discharged from the said trust and settlement.

And it is further *Decreed*, that the said petition of *Mordecai L. Flagler*, be, and the same is hereby dismissed with costs, to be taxed by the register.

Under this decree, the case went before the auditor ; the parties took testimony, and various proceedings were had. *Helms* and wife expressed their assent to this decree in substance, as it stood ; but prayed to have it so modified as to give her a greater control over the property than was allowed to her during her coverture ; which the Chancellor refused to grant. After which, *Anna* and her son *Wandelohr*, applied to have a part of the sum directed to be settled on her, invested in real estate in Pennsylvania. In reply to which, the Chancellor said, it was very clear, that no investment could be ordered or allowed to be made beyond the jurisdiction of the court. The case was then referred to a special auditor, who made a report accordingly. After which, *Anna G. M. Helms* made an appointment in nature of a will, as allowed by the decree, and soon after died ; so that the case abated. A bill of revivor was filed, which being answered, and the case submitted, a decree was passed on the 22d of June, 1832, by which the principal matters in controversy, were, in accordance with the previous decree, finally determined.

BROWN v. WALLACE.

The auditor having awarded to each claimant a dividend on the whole amount of his claim, including interest up to the day of sale, the report was confirmed, and the proceeds directed to be applied accordingly, with interest on the commission and dividends in proportion as it had been or might be received.—According to the terms of the usual decree for a sale, the purchaser pays interest whether he gets possession or not.—No sale of a party *pendente lite* can affect the title of the purchaser under the decree.—The report of the trustee, when confirmed, is conclusive as to the terms of the sale.—When land is sold by the acre, a survey and measurement, to ascertain the amount, is granted as of course.—In what cases land may be said to be sold by the tract or by the acre.—A purchaser, cannot impeach the sale on the ground, that more had been sold than was necessary.—The

rule *caveat emptor*, applies to all judicial sales ; the operation of this rule — Courts of equity, having concurrent jurisdiction, should not be brought into collision ; how such collisions may be avoided.

IN order that the opinion of the court upon the two cases which, under the name of *Brown* against *Wallace*, were together brought before it, discussed, and submitted for judgment, may be fully and correctly understood, it will be necessary to make a report of the previous case of *Mitchell* against *Mitchell*, instituted in this court, out of which those cases arose, and upon which they were founded.

On the 23d of May, 1811, a bill was filed here by *James Mitchell* and *Aquila Mitchell*, infants, by *Abraham Jarrett*, their guardian, against *Parker Mitchell*, *Kent Mitchell*, *William Mitchell*, *Sarah Mitchell*, *John Hughes*, and *Charlotte* his wife, *Thomas Herbert*, and *Elizabeth* his wife, *Samuel Hopkins*, and *Mary* his wife, *Joseph Hopkins*, and *Clemency* his wife, *Thomas Chesney*, and *Hannah* his wife, all of full age, and *Edward Mitchell* and *Ann Mitchell*, infants. The bill states that *James Mitchell*, the father of the plaintiffs, died some five years previous intestate and seized in fee simple of several parcels of land, which descended to his children and heirs, *Martin Mitchell*, *Kent Mitchell*, *Bennet Mitchell*, and *Harriet Mitchell*, with these plaintiffs, *James Mitchell* and *Aquila Mitchell* ; that upon the petition of *James* and *Aquila*, to Harford county court, under the act to direct descents for a partition of the land so descended, a commission was accordingly issued and returned to that court, stating that, by reason of a valuable fishery, it could not be divided without loss, and that the lands had been valued altogether at \$9,830. Upon which, on the 15th of March, 1810, *William Mitchell*, being the purchaser of *Martin Mitchell*, the eldest heir's share, came into that court, and elected to take the lands at the valuation. Since which election, *William Mitchell* had died intestate, leaving these defendants his heirs, and without having paid to these plaintiffs any part of the value due to them ; that administration on the personal estate of *William Mitchell*, deceased, had been granted to the defendant, and that the personal estate of the intestate *William* was altogether insufficient to pay his debts. Whereupon the bill prayed that the said lands, which were at law and in equity charged with the plaintiff's demand, might be sold to pay the amount due to the plaintiffs. (a)

On the 21st of December, 1811, the defendant *Parker Mitchell* put in his answer, in which he admits the proceedings in Harford county court, for a partition of the intestate *James'* estate among his six children, the election of *William*, and also the fact of his having purchased the share of *Martin Mitchell*, as stated in the bill; and then says that his father, the intestate *William*, had moreover purchased one-half of the share of *Bennett*, the other half of which was purchased by this defendant, who had also bought the share of *Kent Mitchell*, another of the heirs of the intestate *James*; and that there was a very valuable fishery upon the land called *Cooley's Fishery*, for which an action of ejectment had been brought, and was then depending. Upon all which this defendant submitted, that if a decree should pass for a sale, that the fishery should be retained, or not sold until necessary, &c.

The other adult defendants, by their answer, filed on the 22d of December, 1811, say that they have no general knowledge of the matters set forth in the bill; but do not deny the truth of its allegations, and recommend a sale. The infant defendants put in their answer by guardian *ad litem* on the same day, to the same effect.

Some time after the bill had been filed, but when does not appear, *Harriet Mitchell*, by her petition, found among the papers, but not marked filed, stated that she had been informed that a bill had been filed by her two brothers, *James* and *Aquila*, as heirs of *James Mitchell*, deceased, for the sale of the real estate of the said *James*, as taken by *William Mitchell* at the appraisement, to satisfy their proportions of the valuation; that she was also one of the children and heirs of *James Mitchell*, deceased, and that she had received no satisfaction for her proportion of the valuation. Whereupon she prayed that the said estate might be sold, &c.

10th March, 1812.—KILTY, Chancellor.—This case standing ready for decision, and being submitted, the proceedings were read and considered. Whereupon it is *Decreed*, that such part of the property in the proceedings mentioned, as may be sufficient to pay the sums due from *William Mitchell* to the heirs of *James Mitchell* be sold; that *James Wallace* be, and he is hereby appointed trustee for making the said sale, &c. The terms of which sale shall be, that the purchaser shall give bond for the payment of the purchase money, with interest, within twelve months from the day of sale, &c. Provided, that the said trustee shall, in the first place, sell the part of the estate clear of and excluding the fishery called *Cooley's Fishery*, mentioned in the answer of *Par-*

ker Mitchell, until the further order or decree of this court in the premises.

On the 29th of April, 1812, an agreement in writing was made and signed by all these defendants, except the infant defendant *Ann Mitchell*, and filed, which, after referring to this decree, proceeds, in these words: 'Therefore we, the subscribers, heirs of *William Mitchell*, being desirous that the whole of the property mentioned in the proceedings aforesaid should be sold in the same manner and on the same terms as is mentioned in the said decree; do hereby authorize and request the said *James Wallace*, trustee aforesaid, to sell the whole of the property mentioned in the said proceedings, on the same terms as is mentioned in said decree; and we do hereby further authorize and request the honourable the Chancellor of Maryland, to ratify and confirm the said sale, when so, as aforesaid, made by the said trustee.'

On the 22d of July, 1812, the trustee *Wallace* reported that, after having given notice of the time, place, manner and terms of sale, as required, 'he caused the said property to be laid off in lots, and sold as follows, *viz.* Lots Nos. 1, 2, 3, 4 and 5, containing ten acres each, and lot No. 6, containing six acres, the said six lots being the whole of the tract called *Convenience*. Lot No. 7, the tract called *Herman's Addition*, and *Betty's Lot*, containing sixty-two acres. Lot No. 8, the fishery called *The Cove*, with ten acres of land bounded as follows, *to wit*: Beginning, &c. &c., containing, and laid out for ten acres of land, more or less. Lot No. 9, the fishery called *Barne's Fishery*, with five acres of land, bounded as follows, beginning, &c. &c., containing five acres of land, more or less. Lot No. 10, part of a tract of land called *Rupulta*, and known by the name of *Barne's Rupulta*, beginning, &c. &c., containing one hundred and thirty-nine acres, including fifteen acres, heretofore laid off for *Mrs. Dorset's* dower, and not sold with this lot. Lot No. 11, part of a tract of land called *Rupulta*, and known by the name of *Gover's Rupulta*, beginning for the same at the second boundary of the whole tract called *Rupulta*, and running thence, &c. &c. to the beginning, and laid out for one hundred and forty-three acres.' The trustee further says, in his report, that the day being rainy, he postponed the sale to the 7th day of May, 1812, of which he gave notice, when he attended, and 'proceeded to sell said property in the following manner, *viz.* the said trustee first exposed for sale lot No. 1,

and *William B. Stokes* became the highest bidder and purchaser thereof, by bidding therefor \$41 per acre, amounting, in the whole, to the sum of \$410.' That he then offered for sale, and sold lots Nos. 2 and 3, of which, with lot No. 1, it was agreed, by the bidders for them, that *Samuel Hughes* should be let in as the purchaser. That of lot No. 4, *William Cole* became the purchaser at \$43 per acre; and of lot No. 5 at \$34 50 per acre. 'The trustee then offered for sale lot No. 6, and said *William Cole* became the highest bidder and purchaser thereof, by bidding therefor the sum of \$20 per acre, amounting, in the whole, for said lot, to the sum of \$120.' The trustee further says that he sold lot No. 7 to *Abraham Jarrett*; No. 8 to *Samuel Hopkins*; No. 9 to *Joseph Hopkins*; No. 10 to *Parker Mitchell*; and then the trustee concludes his report in these words. 'The said trustee then offered for sale lot No. 11, and *Freeborn Brown* became the highest bidder and purchaser thereof, by bidding therefor \$23 per acre, amounting, in the whole, to the sum of \$3,289; and the said *Freeborn Brown* now refuses to give bond for the payment of the purchase money. The said trustee further states that all the heirs of *William Mitchell*, and those with whom they have intermarried, except ——— *Mitchell*, who is a minor, having expressed a great desire that the whole of the property mentioned in the proceedings of their suit with the heirs of *James Mitchell*, except their interest in *Cooley's Fishery*, should be sold under the decree aforesaid, and the trustee foreseeing no inconveniency that could result either to the heirs of *William Mitchell*, or the purchaser or purchasers of said property, in case the whole of the sales should not be ratified, did sell the whole of said property in the manner herein before stated.'

Upon which, on the 27th of February, 1813, the usual order *nisi* was passed; and, no cause having been shewn, the sales, as thus made and reported, were, on the 15th of July, 1813, finally ratified and confirmed. Some time after the trustee had thus made his report of the sales, *Freeborn Brown* gave his bond with *William Brown* as his surety for the payment of the purchase money; and *Freeborn Brown* was soon after put into the actual possession of lot No. 11, as the purchaser thereof, by the trustee.

After which *William Cole*, by his petition, stated, that he had purchased as reported by the trustee; but that the tract of land called *Convenience*, of which the lots he purchased were parts, was sold by the acre, and that it was distinctly understood, at the time of the sale, that a deduction should be made for any deficiency;

and that he being the last purchaser, the deficiency all fell on him, as he was to take the residue. On which petition the trustee *Wallace* certified as follows, that on the day of sale he made it known, 'that, if upon an accurate survey it should be found, that the tract called *Convenience* did not contain fifty-six acres, that the deficiency should be deducted from the last lot of said tract sold, containing six acres, and the purchaser credited with the price. *Mr. William Cole* was the purchaser, and the price per acre will appear by reference had to my report. The said tract has been since surveyed by *Mr. Osborn*, who certifies, that it contains only fifty-four acres, which I believe to be correct.'

22d February, 1814.—KILTY, Chancellor.—Ordered, that the trustee credit the principal of the petitioner's bond with the price of two acres of lot No. 6, viz. \$40.

The auditor in a report bearing date on the 17th of June, 1814, said, that he had, at the request of the said *Abraham Jarrett*, stated an account between the estate of the said *William Mitchell*, deceased, and the heirs at law of *James Mitchell*, deceased, in which the intestate *William's* estate was charged with the valuation of the intestate *James's* estate. *William's* estate was then credited by one-sixth of that sum as the portion of *Martin*, the eldest heir of the intestate *James*, and also by one-twelfth of that sum, being the one-half of the portion of *Bennet*, another heir of the intestate *James*, which it was stated, in the defendant *Parker Mitchell's* answer, were purchased by the intestate *William* in his life-time; but whether those portions had been paid for, did not appear; there being no evidence upon the subject. The auditor further said, that he had then apportioned the balance, \$7,372 50, due from the estate of the intestate *William*, to *Harriet Mitchell*, one-sixth; to *James* and *Aquila Mitchell*, the complainants, one-sixth each; and to *Parker Mitchell*, who alleged in his answer, that he was the purchaser of *Kent Mitchell's* portion, and the remaining half of *Bennet Mitchell's* portion, their shares accordingly; but that there was no proof of the purchase or payment for those portions. That all these claims so ascertained against the estate of the intestate *William*, including interest to the day of the trustee's sale, amounted to \$8,321 13. The auditor further reported, that *Martin Mitchell*, *Bennet Mitchell*, and *Kent Mitchell*, whose interests seemed to be materially affected by these proceedings, were not parties; and, therefore, respectfully submitted, whether they ought

not, in some shape, to have notice of the complainants' application and the allegations of the defendants.

22d June, 1815.—KILTY, Chancellor.—Ordered, that the claims against the said estate, which are now, or may be exhibited, be decided on during the sittings of the ensuing July term, on application. The trustee is desired to have a copy of this order published three weeks in the American, and to forward a certificate of its publication, and the expense, which will be allowed.

A copy of this order having been published as required; the auditor, by a report dated on the 27th of February, 1816, said, that he had stated an account between the estate of *William Mitchell*, deceased, and the trustee, in which the proceeds of the estate were first applied to the payment of the trustee's allowance for commission and expenses, the costs in this court, and the several claims as heretofore stated and reported; and the balance was equally divided between the heirs at law, of the said *William Mitchell*.

29th February, 1816.—KILTY, Chancellor.—Notice having been given, as directed by the order of 22d June, 1815, and no application having been made in support of the objections suggested in the auditor's first report; and the auditor having appropriated the proceeds by this statement and report; the same are confirmed, and the proceeds are directed to be applied accordingly, with interest on the commission and dividends, in proportion as it has been or may be received. (b)

No further proceedings appear to have been had in this case by any of the parties.

The first of these cases of *Brown* against *Wallace*, was instituted by a bill filed in Harford County Court, on the 8th of May, 1818, by *Freeborn Brown* and *William Brown*, against *James Wallace*. This bill stated, that the plaintiff *Freeborn*, purchased the lands of the defendant, as mentioned in his report, in the before mentioned case of *Mitchell* against *Mitchell*, in the High Court of Chancery, in pursuance of the decree in that case, and of the written authority of the 29th of April, 1812; that the plaintiff *Freeborn*, under a belief that the land so purchased by him, did contain the number of acres as stated, gave his bond, with the plaintiff

William, as his surety for the purchase money; upon which bond, after it became due, the defendant *Wallace*, brought suit and obtained judgment, from which these plaintiffs appealed, and the judgment was affirmed by the Court of Appeals, at June term, 1817. That the plaintiff *Freeborn*, had paid to this defendant, the trustee, on the 18th of January, 1818, \$900, in part satisfaction of the judgment. The bill then further stated, that this plaintiff *Freeborn*, was not put into possession of the land so purchased by him until the month of November next after the day of sale; that the tract had been found to contain only one hundred and twenty-six acres, three-quarters and twenty-four perches; and therefore, he claims an allowance for deficiency; that the heirs of *William Mitchell*, deceased, had by a deed dated on the 14th of September, 1815, sold and conveyed a part of this very land to *Carvill Cooley*, and *Charles Cooley*, who had taken possession accordingly; that a suit in chancery had been instituted by *Samuel Gover*, who claimed by a title paramount, against the heirs of *William Mitchell*, deceased, for the recovery of this land; and that an action of ejectment was about to be brought by one *Philip Gover*, for the recovery of the same land, &c. Whereupon the bill prayed for an injunction to stay execution upon the said judgment. And an injunction was granted accordingly, as prayed.

To this bill, the defendant *Wallace*, answered, and admitted the proceedings in the High Court of Chancery as stated; and said, that he had only sold to the plaintiff *Freeborn*, the interest which the heirs of *James Mitchell* and *William Mitchell*, had in the land; and that he did not pretend to warrant the title; that the plaintiff *Freeborn*, was put into possession soon after he gave bond for the purchase money; that at the time of sale, a plot of the land was exhibited, and the sale was made near the land, which was shewn to the plaintiff *Freeborn*, so that he could not have been mistaken with regard to it; that this trustee did not sell to the plaintiff *Freeborn*, any land claimed by the *Cooleys*; and that the plaintiff *Freeborn*, was told of, and had full knowledge of the claim of the *Govers*, on the day of the sale.

These plaintiffs, by a supplemental bill, filed on the 17th of August, 1824, stated, that *Robert Gover* had obtained judgment against them, and turned them out of possession of the land purchased by the plaintiff *Freeborn*. In answer to which, the defendant *Wallace*, alleged, that the said judgment had been obtained entirely by the negligence and default of the plaintiffs.

After which, *Kent Mitchell*, who, although not so expressly stated, appears to have been one of the heirs of *William Mitchell*, deceased, by his petition, not on oath, stated, that he was very much interested in the sum of money which was the subject of controversy; a large proportion of which was to be paid to him, when collected, by the said *Wallace*, who was a mere trustee; and therefore, prayed to be allowed to come in, answer, &c. Upon which, it was, on the 20th of August, 1824, by *Archer, C. J. Ordered*, that the petitioner be permitted to appear, answer, and defend, as prayed. Under this leave, on the 25th of October, 1824, *Kent Mitchell* filed his answer, in which he set forth and relied upon various facts and circumstances, which had been before in substance stated and relied on by the defendant *Wallace*. After which, this defendant *Kent Mitchell*, without oath, or stating any reasons, merely prayed for leave to amend his answer. Upon which it was, on the 6th of November, 1824, by *Archer, C. J. Ordered*, that leave be given to amend the answer, as prayed. Under which leave, this defendant, on the 5th of March, 1825, put in an amended answer, setting forth some few additional facts, but none having any material bearing upon the questions afterwards submitted for determination.

The second of the cases of *Brown* against *Wallace*, was also commenced in Harford County Court, by a bill filed on the 5th of March, 1825, by *Freeborn Brown* and *William Brown*, against *James Wallace*. This bill stated the same facts and circumstances as in the first bill, and alleged, that the trustee *Wallace*, was wholly unable to make a good and valid title to *Freeborn Brown*, for the land so purchased by him. Whereupon it was prayed, that the said contract between the plaintiffs and the defendant, respecting the property in the proceedings mentioned, might be set aside, vacated, cancelled, &c. To this second bill, the defendant *Wallace*, put in an answer, substantially similar to that which he had made to the first bill.

After hearing the motion to dissolve the injunction, the matter was considered, and the motion was overruled. On the 13th of March, 1826, *Freeborn Brown's* death was suggested; and *Mary B. Brown*, his executrix and devisee, was admitted as a plaintiff in his stead. These cases were then removed to this court, under the act of 1824, ch. 196, and the proceedings all filed here on the 8th of May, 1827. After which, on application, a survey was ordered, made, and plots returned; testimony was taken and

brought in; and some other proceedings were had; any particular account of which is, however, deemed unnecessary. Upon all which, these several cases were together brought before the court.

5th July, 1830.—BLAND, *Chancellor*.—The parties having agreed, that these two cases should be heard together and consolidated; and there being a convenience in having them so associated; and as it may prevent confusion, and save repetition, I shall therefore treat them as one suit. And that no equity, nor any real ground of relief may be lost to this purchaser, I shall consider all that is alleged in these several bills as if it had been regularly introduced into the suit originally instituted in this court, by a petition in which every thing stated in those bills had been fully set forth. And I shall then consider whether these bills, filed in a court of concurrent jurisdiction, ought not to be dismissed, even supposing, that they had presented a fit subject for equitable relief, because of their being incompatible with the proceedings in this court.

The first position assumed by this purchaser is, that he did not obtain possession until several months after the day of sale; and, therefore, that so much of the judgment against him as gives interest from that time is against equity, and ought not to be allowed.

It is a general rule as to sales under decrees of this court, that the purchaser always pays interest, according to the terms of the decree, from the day of sale, whether he gets possession or not. His getting possession is, in no case, allowed to be a condition precedent to the payment of either principal or interest of the purchase money. The purchaser is presumed to regulate his bidding with a view to the known powers and rules of the court as to delivering possession. There is, therefore, nothing in this objection, even supposing this purchaser himself to have been in no default; and, by promptly giving his bond, to have so clothed himself with an equity to demand a delivery of possession immediately after the sale had been finally ratified. But looking to his evasion or negligence, this objection comes with an ill grace from him. (c)

The next position assumed by this purchaser is, that because the heirs of the late *William Mitchell* have, since he bought, sold a part of the same land he purchased to *Carvel* and *Charles Cooley*, by a deed dated on the 14th of September, 1815, that therefore he should not be compelled to pay the purchase money.

Of this, however, there is no clear proof. But suppose the fact to be so ; it would be strange indeed if any party to a suit, after the court had decreed his land to be sold, should be able to defeat the sale ; or could afford to the purchaser a sufficient reason for not paying the purchase money, by merely making a conveyance of the land to some third person, so as to give to such third person a pretext of title on which to bring suit against the purchaser from the court. It is clear, that the whole title of the heirs of the late *William Mitchell* to the lands embraced by the deed of the 14th of September, 1815, was sold by the trustee, or that it was not. If it was sold, then the subsequent purchaser from those heirs can have no title ; and the title of the purchaser under this court's decree cannot, in this respect, be impeached. (d) If, on the other hand, their title to the lands described in that deed was not sold by the trustee to *Freeborn Brown*, then he has nothing to complain of ; and the whole affair is entirely foreign to the matter now under consideration. This objection is therefore utterly groundless.

Another point upon which this purchaser rests is, that he bought by the acre, and that the trustee represented the tract which he, *Brown*, bought, called *Gover's Rupulta*, as containing one hundred and forty-three acres, when in truth it did not contain quite one hundred and twenty-seven acres ; and therefore, that he ought to have a deduction to the amount of this deficiency.

It is not alleged, that the deficiency is in that part of the lot which was the inducement to the purchase ; or that it is of such a nature as materially to vary the contract, it is merely a claim for an allowance on account of short measure ; as if by the terms of the contract a measurement was absolutely necessary to reduce it to certainty and to ascertain the amount of the purchase money to be paid.

The position here taken rests upon an assumption of the fact, that the land was sold only by the acre ; or in lots of an indefinite size at \$23 per acre. But according to the trustee's report, such was not the fact ; and there is no satisfactory proof that it was sold in any other manner than as there stated. In the absence of clear proof of mistake, misrepresentation or fraud, the ratified report of the trustee is the only evidence of the contract by which the court can allow itself to be governed ; and unless it be so impeached, it must be considered as conclusive upon the subject. (e)

(d) *Powell Mortg.* 547, n. R.—(e) *Townshend v. Stangroom*, 6 Ves. 328 ; *Higginson v. Clowes*, 15 Ves. 516 ; *Clowes v. Higginson*, 1 Ves. & Bea. 524.

It is stated by the trustee, that he caused the lands to be laid off into several distinct parcels, described by metes and bounds and number of acres; and that he sold them in that manner; each parcel as a separate body of land for an amount ascertained by the number of acres said to be contained within the specified metes and bounds; and not by the acre alone, or in lots Nos. 1, 2, 3, &c. of an indefinite size, without reference to boundary, or other more particular description, at so much by the acre, so as to render a measurement indispensably necessary to ascertain the amount of the purchase money. In England, a commission may be issued to ascertain the quantity where the contract is to pay by the acre, and the quantity is uncertain; (*f*) but here it has always been the practice of this court, where its trustee has made a sale at so much per acre, as a matter of course, to order a survey to ascertain the quantity of land and thereby the amount of the purchase money. (*g*)

But that these several parcels of land were sold by the tract, and were distinctly understood to be sold in that manner by all the bidders present at the sale, is clearly shewn by the explanations in relation to lot No. 6, which was sold by the acre as a residuum of the tract called *Convenience*; but all the other lots, from No. 1 to No. 11, were sold by the tract; all of them lying within certain specified metes and bounds made known to the bidders at the time of the sale. After thus describing one of those lots, the number of acres is specified with the usual reservation, 'more or less;' and lot No. 11, after being so described, is said to have been 'laid out for one hundred and forty-three acres.' And in each case the purchase money is summed up, and the purchaser is reported as having agreed to give a designated sum total. What is meant in general by the phrase, 'more or less,' or 'laid out for so much,' in conveyances of land in reference to quantity seems to remain as yet unsettled. The *proprietary's* instructions fixed it as a rule for the land office, as to grants from the state, that they should be allowed to cover no more than ten *per cent*; but there has been no rule established as to other grants or conveyances. (*h*)

There is, however, no direct and satisfactory proof of any deficiency in lot No. 11, as described and sold. It is not shewn

(*f*) *Shovel v. Bogan*, 2 Equ. Ca. Abr. 688.—(*g*) *Carter v. Campbell*, Gilmer's Rep. 159.—(*h*) *Townshend v. Stangroom*, 6 Ves. 340; *Winch v. Winchester*, 1 Ves. & Bea. 375; *Portman v. Mill*, 3 Cond. Cha. Rep. 238; *Hoffman v. Johnson*, 1 Bland, 109; *Land Hol. Ass.* 253; *Andrews v. Scotton*, post.

that the boundaries by which the trustee sold that lot, do not embrace the whole number of acres which they were said to contain.

I am therefore of opinion, that this purchaser has failed to sustain this claim for an allowance for deficiency; in the first place, because the land was sold to him by the tract, and not by the acre; and in the next place, because in point of fact, he has shewn no deficiency within the designated boundaries.

This purchaser, *Freeborn Brown*, however, advances still further, he prays to have the whole sale to him rescinded; and to have so much of the purchase money as he has paid, returned to him. And this he asks upon two grounds, first, that although the decree of the 10th of March, 1812, restrained the sale to so much only, as should be sufficient to satisfy the claims therein mentioned; yet the trustee made sale of the whole of the interest of the heirs of the late *William Mitchell*, by virtue of a pretended power, dated on the 29th of April, 1812, from those heirs, to sell the whole, when in truth, several of them were minors, and incompetent to give any such power to sell; and the sale was ratified by the Chancellor under a mistaken impression, that those heirs were of full age, and able to convey; so that this lot No. 11, was disposed of, which otherwise would not have been sold.

The position here assumed is in direct opposition to the terms of the decree; of the trustee's report; and of the instrument of the 29th of April, 1812. There is nothing upon the face of those documents, taken either separately or together, by which this position can be sustained. But *Freeborn Brown* must, in this respect, take upon himself one of two characters. He must stand either as a purchaser under what he calls the power of the 29th of April, 1812, or as a purchaser under the decree of this court. He cannot blend the two, and take advantage of both at the same time.

If he bought under the power, then he is a purchaser direct from the heirs of the late *William Mitchell*, and this court has no jurisdiction of the matter in any way whatever in this case. Those heirs, in that respect, were not under the control of this court; they were entirely free to sell any right or interest of theirs as they might think proper, either in person or by *James Wallace* as their attorney. But it is perfectly evident that they could not, by giving a power of attorney to *James Wallace* to sell for them, who was also at the same time acting as the agent or trustee of this court, thereby mingle any of their separate interests with the subject with

which the court was then dealing ; they could not, thus uninvited, thrust their own individual interests into a cause which was under the direction of the court for the benefit of others as well as themselves. Therefore, in this view of the subject, the instrument of the 29th of April, 1812, must be deemed entirely foreign from the matter under consideration. (i)

If, on the other hand, *Brown* takes his stand as a purchaser from the court, then, on recurring to the decree and trustee's report, it will be seen that the decree covers the whole subject, and that the trustee has confined himself strictly within the limits of the decree. The bill had stated that two of the heirs of the late *William Mitchell* were minors, and they had answered as such ; the trustee had again incidentally reminded the Chancellor that one of them at least was then a minor, in that part of his report in which he speaks of their desire to have all the land sold. After this, it seems strange to object that the Chancellor had ratified the sale under a mistaken impression that all those heirs were of full age ; on the contrary, it is manifest that, from beginning to end, the Chancellor was perfectly aware that he was dealing with the property of infants. There could have been no mistake in this particular. It is said that the instrument of the 29th of April, 1812, induced the court to sanction the sale of the whole, which it otherwise would not have done. But the court had previously decreed the sale of the whole, or 'such part of the property in the proceedings mentioned as may be sufficient to pay the sums due from *William Mitchell* to the heirs of *James Mitchell*,' excepting Cooley's Fishery ; and no more having been sold than was thus authorized by the decree, the ratification of the sale certainly could not be objected to on that account. It has long been the course of the court to ratify sales at once, with the consent of all concerned ; and the instrument of the 29th of April, 1812, in reference to that practice, merely indicated that there would be no opposition to a ratification from those parties. But it is the habit of this court, for convenience, to carry to market property which, in a subsequent part of the cause, perhaps, it would have been unnecessary to sell ; looking at its own powers of setting right the interests of all parties as among each other. The court often directs real estate to be sold before it can know the real situation of the personal estate. (j)

(i) *Weems v. Brewer*, 2 H. & G. 397.—(j) *Holme v. Stanley*, 8 Ves. 1 ; *Lloyd v. Johnes*, 9 Ves. 65 ; *Hammond v. Hammond*, ante 359.

And even supposing it to be true, that the instrument of the 29th of April, 1812, had an influence upon the trustee and the Chancellor in making and finally ratifying the sale, they were certainly right in thus consulting the convenience of the parties. And if, in truth, more land had been improperly sold than was absolutely necessary to meet the purposes of the suit, it is clear that a purchaser cannot be allowed to come in and object to the sale on that account. (*k*)

I am, therefore, of opinion that the validity of this sale to *Freeborn Brown* cannot be affected by any thing that has been shewn on this ground.

This purchaser asks a rescision of the sale, in the next place, upon the ground that suits have been instituted in which it is alleged, and appears that neither the late *James Mitchell*, the ancestor of the two plaintiffs, nor the late *William Mitchell*, the ancestor of the defendants, to the decree of the 10th of March, 1812, under which the land was sold, had any title to it; and that in one of those suits, an action of ejectment, a judgment had been entered against the casual ejector, and *Freeborn Brown* had been actually turned out of possession; and, therefore, as the court cannot make to this purchaser a good title, he ought not to be compelled to pay the purchase money.

In England, it seems that when lands are decreed to be sold, the court, in most instances, undertakes to sell a good title; and, therefore, it is common, in such cases, to make a reference to a master to see whether a good title can be made or not to the purchaser, who will not be compelled to take a doubtful title. (*l*) In Maryland, the course has always been different; here, as to all judicial sales, the rule *caveat emptor* applies. (*m*) The court, in no case, undertakes to sell any thing more than the title of the parties to the suit; and consequently it allows of no inquiry into the title at the instance of a purchaser, or any one else. The court makes no warranty, of any kind, of the title sold by its trustee; and, therefore, cannot listen to any objection as to defect of title, or be involved in any inquiry into its validity. (*n*)

(*k*) *Lutwych v. Winford*, 2 Bro. C. C. 248; *Burke v. Crosbie*, 1 Ball & Bea. 501.

—(*l*) *Marlow v. Smith*, 2 P. Will. 198; *Shaw v. Wright*, 3 Ves. 22; *Noel v. Weston*, Coop. Rep. 138; *Coffin v. Cooper*, 14 Ves. 205; *Roffey v. Shallcross*, 4 Mad. 227; *Eyton v. Dicken*, 2 Exch. Rep. 118.—(*m*) *Ridgely v. Gartrell*, 3 H. & McH. 450; *The Monte Allegre*, 9 Wheat. 644; *Finley v. Bank U. S.*, 11 Wheat. 307.—

(*n*) *Toulmin v. Steere*, 3 Meriv. 223; *Palmer v. Humphrey*, Cro. Eliz. 584; *Gilbert Execu.* 35; 2 Harri. Pra. Cha. 150; 1 Newl. Pra. Cha. 330.

The operation of this general rule is, in many respects, mutually beneficial; for, as on the one hand, the court, by selling only the title of the parties to the suit, and giving no warranty, involves itself in no expensive, dilatory, and troublesome inquiries into the validity of the title; so on the other hand, the purchaser is not answerable for any irregularity of the court, nor for any disposition which it may make of the purchase money; he has a right to presume that the court has acted correctly in decreeing a sale. But as the court offers, and he takes no more than the title of the parties to the suit, it is his duty to see that all who have an interest in the property, and whose right ought to be bound by the decree, have been made parties to the suit for that purpose, and have been concluded by the decree under which he buys. And it is also necessary, for the same reason, that the purchaser should ascertain for himself whether or not the title of those parties may not be impeached or superseded by some other and paramount title. For he has no right to call upon the court to protect him from a title not in issue in the case, and no way affected by the decree. (o)

Here I might stop and pronounce a final decree, that these two bills be dismissed. But it has been urged that the Harford County Court, although clothed with power, in all respects equal and concurrent with this court, had, in effect, no jurisdiction of this matter; because it was merely a branch of a suit then depending here; and because the prosecution of these suits in that court thwarted and was incompatible with the regular progress of the suit here embracing the same subject.

It is obviously necessary for the public good, that the several courts of justice of our system, should never allow themselves to be brought in collision with each other. And, in general, they are so well ordered as to all matters of common law, that they cannot cross each other in any way whatever. Unfortunately, however, the sphere of each one having concurrent equity jurisdiction has not been so well described as to prevent occasional interferences, even where there exists the most decided intention in each to confine itself strictly within its own orbit.

Soon after I came here I was made sensible of the necessity of great care and vigilance in order to steer clear of any collision

(o) *Giffard v. Hort*, 1 Scho. & Lefr. 386; *Bennett v. Hamill*, 2 Scho. & Lefr. 566; *Lloyd v. Jöhnes*, 9 Ves. 65; *Curtis v. Price*, 12 Ves. 105.

with my co-ordinate neighbours, and yet have not been able to do so upon all occasions; because of the facts of the case not having been fully disclosed in the first instance. In a case where the plaintiff merely represented that he had become the debtor of the defendant by bond, on which judgment had been obtained at law, without giving him all the credits to which he was equitably entitled; I granted an injunction to stay the proceedings at law. But on its being clearly shewn by the answer, that the plaintiff at law was suing there on a bond he had taken as a trustee under a decree of the county court of equity, I not only dissolved the injunction, but dismissed the bill with costs, on the ground that the proceedings upon the bond were properly a branch of a suit depending in another court of equity with whose movements this court ought not to intermeddle. But on another occasion, when I had passed a decree for the payment of a sum of money, and the party had sued out a *fieri facias*, a county court granted an injunction to stop the further proceedings upon that *fieri facias*. In that case the collision was palpable and direct. I determined, however, to submit, and without pressing the conflict, which could have been attended with no good effect, to leave the error to be corrected by the county court itself.

The recollection of these circumstances, has suggested the propriety of explaining my views upon this subject more fully than might otherwise have been deemed necessary.

It has been thought by some, that where any one court of competent authority, had in any manner expressed an opinion on a subject, every other court having no more than a concurrent jurisdiction, was thereby precluded from taking cognizance of the same matter. But it is believed, that the general rule is not so entirely comprehensive.

It is certain, that a judgment or decree upon any matter put in issue between the same parties, in relation to the same subject, is a complete bar to any subsequent suit for the same matter. So too, after a suit has been instituted, and is then depending in any court of competent jurisdiction in this state, though it is not so with regard to a suit in a foreign court, no other suit can be maintained for the same subject between the same parties. (p) And even if the one suit be brought in a court of common law, and the other in equity, to prevent such duplicate vexation, the Court

of Chancery will put the plaintiff to his election, and compel him to abandon the one suit or the other. (*q*)

These rules can only apply where the parties and the subject are the same in both suits; but if there be any essential differences between the two, either as to parties, or subject of controversy, as in the cases under consideration, other reasons and principles apply.

It has been said, that where an injunction had been refused by the Chancellor, it could not be granted by a county court upon the same case; or the reverse. This opinion seems to be sufficiently well founded, if referred to a case in which the first bill is actually depending at the time when the second application is made to the co-ordinate court; or where, on hearing of the parties, or by default, the one court has refused or dissolved the injunction upon the same case, in which an injunction is asked for in the other court. Because, if all that had been done in the one court, was to go for nothing in the other, a party might in every instance, as a matter of course, avail himself of all the delay to be had in the one court, and then take advantage of the identical same means of procrastination in the other court, after a solemn judgment had been pronounced there upon his case, without resorting to the regular course of setting that judgment right. (*r*)

But an injunction is, in its effects and consequences, in many respects, analogous to a *prohibition*. The object of an injunction is to protect the citizen from harm, by acting upon the person complained of. The same object is, in many instances, intended to be accomplished by a *prohibition*, which acts immediately upon the inferior tribunal; (*s*) a party may apply to each one of the superior courts, in succession for a prohibition; and his *ex parte* application having been refused by one, is of itself, no ground for its being rejected by any other of them. (*t*) I therefore do not see why, upon the same principles, a citizen might not be allowed to take his chance, by a first *ex parte* application of obtaining an *injunction* from each one of the courts having jurisdiction of his case, in like manner as he is allowed to apply to each one for a *prohibition*, without prejudice from having been refused by another of them; particularly as the statute (*u*) does not require an injunction

(*q*) 1 Newl. Pra. Cha. 246.—(*r*) Reynolds v. Pitt, 19 Ves. 138.—(*s*) Eden Inj. 3.—(*t*) Smart v. Wolff, 3 T. R. 340; Forum Rom. 55.—(*u*) 4 Ann. C. 16, s. 22; Kilty Rep. 247.

bill to stay waste or proceedings at law, to be filed before the *sub-pœna* is issued. (*w*)

Under our government, the federal courts and the state courts have, in many instances, a concurrent jurisdiction; and either may have cognizance of the case, either as a court of common law or of equity. If the plaintiff and the defendant be citizens of different states, the suit may be brought in either; but if the suit be instituted in a state court, its proceedings will not be stayed by an injunction from a federal court; or the reverse; not because the court has not jurisdiction of such a subject between those parties; but because it could not exercise its jurisdiction in that case, without bringing itself injuriously in conflict with another tribunal, with whom it ought not on any account to interfere. (*x*)

The two great co-ordinate courts of equity of England, are the High Court of Chancery, and the Court of Exchequer. The first is the prototype of this court. The Exchequer, as the phrase is, has two sides; it is a court of common law, as well as of equity. It is composed of a plurality of judges; and is, in all respects, a *term court*; being in these particulars, essentially different from the Court of Chancery; which is composed of only one judge, and is most emphatically, *always open*. The Exchequer, like our federal circuit courts, and our state county courts, is so organized, that it can exercise scarcely any of its equity powers, except in term time; and owing to the delays and expense of proceeding with its equity business only from term to term, the continually open Chancery Court, has a most decided advantage over the Exchequer, which, on that account, is almost deserted as a court of equity. (*y*)

In this, and other respects, the analogy between the High Court of Chancery, and the Court of Exchequer of England, as co-ordinate courts of equity, and the High Court of Chancery, and the county courts of equity of Maryland, as co-ordinate courts of the same description, is so close and striking, that the cases in relation to the conflicts of jurisdiction, between those English courts, may be applied as most instructive illustrations of the effects of any similar clashing between our own co-ordinate courts of equity.

It is a rule between those English courts, that where they have both an entirely concurrent jurisdiction of the same matter, that

(*w*) *Williams v. Hall*, 1 Bland, 193, note.—(*x*) *Diggs v. Wolcott*, 4 Cran. 179; *McKim v. Voorhies*, 7 Cran. 279.—(*y*) *Crowley's Case*, 2 Swan. 11; 1 London Jurist, art. 7.

court is entitled to retain the suit which has been first commenced. There are some early instances of disputes between those tribunals in which the one has issued its injunction against the officers of the other. But latterly, there is no instance of either having enjoined a party from proceeding in the other. That court in which the suit has been last instituted, or in which the proceedings are least comprehensive and perfect, has, in general, given way to the other; or forced the parties to betake themselves to that court in which the first suit was instituted, or where the most perfect proceedings were then depending. But after a bill to redeem a mortgage has been filed in one court, a bill to foreclose may be brought in the other; and a cross bill may be filed in chancery to an original bill in the Exchequer; and so too, either court will retain its suit, when the bill in the other has been dismissed. (z)

But there is no instance to be met with in which either one of the English courts has ever attempted to hinder or stay any part of the proceedings in a suit which had been rightfully instituted, and was then progressing in the other; as by enjoining a trustee proceeding in the direct execution of a decree; or staying a proceeding by execution to enforce the payment of money decreed to be paid; nor has it been ever intimated, that either of those courts would call before it the parties to a suit depending in the other to give an account of acts done under the authority of the other; or to have the money or property with which the other was dealing, or which was in the hands of its officers or agents, brought in to be there disposed of by itself. Yet all this should have been considered and adjudged as settled and correct, as between those English courts in order to sanction, by mere analogous authority, what appears, by these proceedings, to have been done by the Harford County Court.

From these proceedings it appears, that there never has been before that court any defendant who had in reality any thing more than a bare *pro forma* interest in the matter in controversy; for I put out of the question *Kent Mitchell* of whom the plaintiffs made no complaint, and did not charge as a party. *James Wallace*,

(z) *Vendall v. Harvey*, Nelson, 19; *Newburg v. Wren*, 1 Vern. 220; *Nicholas v. Nicholas*, Prec. Cha. 546; *Coysgarne v. Jones*, Amb. 613; *Bullock v. Bullock*, 3 Swan. 698; *Jackson v. Leaf*, 1 Jac. & Wal. 232; *Harrison v. Gurney*, 2 Jac. & Wal. 563; *Glegg v. Legh*, 4 Mad. 192; *Bushby v. Munday*, 5 Mad. 297; *Parker v. Leigh*, 6 Mad. 115; *Pitcher v. Rigby*, 4 Exch. Rep. 30; *Myddleton v. Rushout*, 1 Eccles. Rep. 81; *Kibblewhite v. Rowland*, 3 Eccles. Rep. 412, note, s. 543; 1 Fowl. Exch. Pra. 270; 1 Mad. Cha. 128.

the defendant to these bills, was no more than an agent of this court, who might have been removed at its pleasure. He had no interest of his own in the matter. Had he been removed there would then have been no one against whom that court could have proceeded with effect; or had he been permitted to remain, no decree against him alone could have bound the rights of the real parties to the original controversy who were no parties to the bills in Harford County Court. Had *James Wallace*, as a trustee, collected any money as the proceeds of the sale he made under the decree of this court, that court could no more have ordered it to have been brought in and paid over, than it could have taken money levied and held officially by a sheriff of an adjacent county under an execution from his own county court; or money held officially by the messenger or register of this court. (a) If Harford County Court could not have exercised powers to the whole of this extent, it is evident, that the bills which that court allowed to be filed, and required to be answered by *James Wallace*, the trustee of this court, should have been dismissed at once.

These proceedings are not only incompatible with, and calculated to cross and thwart the proceedings of this court, but they were absolutely useless, and needlessly troublesome; because it is manifest, that they could have resulted in no effectual relief; and because this court could have reached, in the most effectual manner, all the objects aimed at by those bills much more expeditiously, and at a far less expense. Of all this, had this case been brought to a final hearing before Harford County Court, I am satisfied, it might and would have been convinced, and upon that conviction would, without hesitation, have dismissed these bills.

Therefore, without revising or reversing any thing which has been heretofore done by that court, I am of opinion, that in consolidating and dismissing these bills, I do no more than would have been done by that tribunal, as well upon the merits, as upon the ground of the incompatibility of the proceeding with the suit now depending in this court.

Whereupon it is *Decreed*, that the several bills of complaint filed in Harford County Court by the late *Freeborn Brown* and *William Brown* be, and the same are hereby consolidated and treated as parts of the bill filed on the 5th of March, 1825, as if the same had been filed on the 8th of May, 1818. And it is further *De-*

(a) *Jones v. Jones*, 1 Bland, 461; *Alston v. Clay*, 2 Hayw. 171.

creed, that the injunction heretofore granted in this case be, and the same is hereby annulled and dissolved. And it is further *Decreed*, that the bill of complaint of the complainants as herein before consolidated, be, and the same is hereby dismissed with costs to be taxed by the register.

See this case as reported in 4 G. & J. 479.

ADDISON v. BOWIE.

All proceedings, exhibits, and proofs must be marked filed before they can be noticed by the court.—A power of appointment as given in a certain will, allowed to be arbitrarily exercised.—A father, so far as he is able, is bound to maintain his infant children; and therefore he is held accountable for the profits of their estate held by him.—A testator cannot, in any way, place his personal estate beyond the reach of his creditors.—A legatee may file a creditor's bill.—Where a testator may put his devisees to an election to take under or in opposition to his will; the court may, in such cases, elect for infants.—A legacy to a creditor may, in some cases, be presumed to have been given merely as a satisfaction of the debt.—The nature of a devise of a right of habitation.—A devise, by a father, 'for the support of the family,' must include the support of the devisor's widow, with the maintenance and education of his infant children.

THIS bill was filed on the 6th of April, 1829, by *Edmund B. Addison*, and *Eliza D. Addison* his wife, against *William D. Bowie*, *Ann D. Bowie*, *Walter B. Bowie*, *Kitty Bowie*, *Richard D. Bowie*, and *John Contee*. The bill states, that *Baruck Duckett*, being seized and possessed of real and personal property of very great value, on the 16th of July, 1809, made his last will and testament, which, although not exhibited with the bill, was afterwards produced and admitted; and so far as it affects this controversy, was in the following words:

'I give and devise to my son-in-law, *William Bowie*, of *Walter*, the plantation whereon I now dwell, likewise the lands called the *Jeremiah* and *Mary*, and the resurvey on the *Jeremiah* and *Mary*, and ten acres of the land purchased of *Henry L. Hall*, to be laid off at the north end, during his natural life only. In case the said *Bowie* should die before his wife *Kitty*, she has hereby a right to remain on, to occupy and enjoy all the aforesaid lands during her natural life. If either the aforesaid *Bowie* or his wife *Kitty*, should cut down, or suffer to be cut down, the enclosed woods below my dwelling house for cultivation, their title to cease and be void for

ever. I hereby authorize the said *Bowie* to designate any one or more of his children, by his wife *Kitty*, who shall have the fee simple in all the aforesaid lands. My will being, that the fee should pass to all or any one of them in the discretion of their father; creating this uncertainty of designation merely as a motive to good conduct in them all.'

'I give and devise to my grandson, *William Duckett Bowie*, my Quarter Plantation, with twenty acres of the land purchased of *Henry L. Hall*, to be laid off at the south end. In case the said *William D. Bowie* should die, leaving no lawful issue, then my will is, that my Quarter Plantation, and the twenty acres aforesaid, should pass to the next eldest son of *William Bowie*, of *Walter*, by his present wife *Kitty*; and if said next eldest son should die without lawful issue, in like manner to the next eldest son, as often as the case shall happen; giving and devising to such eldest son, in fee simple, as I hereby give and devise to my grandson, *William D. Bowie*, in case he should die leaving no lawful issue; and in case of failure of male issue, to pass in fee simple to the daughters of *William Bowie*, of *Walter*, by his present wife *Kitty*.'

'I give and bequeath to my son-in-law, *William Bowie*, of *Walter*, one-third of my negroes. The whole of my negroes to be valued by two impartial men, not related to either side, and divided into three classes, as equal in value, considering age and sex, as can be, and then each class to be distributed by lot; the first number giving the first choice; the second number giving the second choice; and the third number giving the third choice. But in case *William Bowie*, of *Walter*, should set up a claim to any of the negroes at either place, more than then at the Quarter, he and his wife to be barred from any right or title to my real estate. Also, one-third of my stock of all sorts, to be valued, classed, and distributed as the negroes aforesaid; likewise, all my household and kitchen furniture, except what I bequeath hereafter, I give to my son-in-law, *William Bowie*, of *Walter*. I give and bequeath to my grandson, *William D. Bowie*, one-third of my negroes, and one-third of my stock of all sorts. All my plate, one eight-day clock, two large looking-glasses, two feather beds, and their furniture. I give and bequeath the other third of my negroes and stock of all sorts, to the rest of the children of *William Bowie*, of *Walter*, by his present wife *Kitty*, as they arrive at age, or marry, share and share alike. I mean the age of sixteen, for girls. It

is my will, that the crops made at the Quarter, except grain, for the use of the family, be sold, and the money arising therefrom, after the payment of all expenses, be a common fund for the support of all the children of *William Bowie*, of *Walter*, by his present wife *Kitty*, until my grandson, *William D. Bowie*, shall arrive at the age of twenty-one, or day of marriage, when he will hereby have a right to receive every thing I have devised and bequeathed to him. I give and bequeath to my grandson, *William D. Bowie*, all the money, bonds and notes, of which I shall die possessed, after my just debts and funeral charges are paid. If his father should think it advisable to lay it out in land for him, should any be offered convenient to my Quarter Plantation, I give him, by this my will, power to do so. In case *William Bowie*, of *Walter*, should die before my grandson, *William D. Bowie*, shall arrive at the age of twenty-one, or day of marriage, my will and desire is, that my brother, *Isaac Duckett*, take his part of my estate into his possession, for the use and benefit of my said grandson. And lastly, I do hereby constitute and appoint *William Bowie* to be sole executor, of this, my last will and testament.'

The bill further states, that afterwards, *Baruck Duckett* died, that this, his will, was, on the 9th of October, 1810, proved according to law; and that immediately thereupon, *William Bowie*, of *Walter*, entered upon the real estate so devised to him, and continued to hold the same until his death; who, being also seized and possessed of other real and personal estate of very great value, on the 10th day of September, 1826, made his last will and testament, which is in these words.

'My father-in-law, the late *Baruck Duckett*, having devised his dwelling plantation to me during life, and also the land called *Jeremiah and Mary*, and the resurvey thereon, with power and authority to me to designate any one or more of my children by his daughter, and to devise it to them in fee, at my discretion; I do devise the same to my son *Walter Baruck Bowie*, and my daughter *Kitty*, their heirs and assigns for ever, in the following proportions, that is to say: to my daughter, *Kitty Bowie*, I give and devise three hundred and fifty acres of my dwelling plantation, to be laid off in convenient and proper form, at the corner of my plantation, next adjoining the lands of my brother *Walter* and *Gabriel Duvall*, to her, her heirs and assigns, for ever. And I give and devise to my said daughter, her heirs and assigns for ever, one-half of the lands which I own, and which were purchased

of *Robert Walters* and — *Clark*. I give and devise to my son, *Walter B. Bowie*, his heirs and assigns for ever, all the residue of the lands devised as aforesaid by *Baruck Duckett*; except ten acres purchased of *Henry L. Hall*; and all the residue of my dwelling plantation, except the three hundred and fifty acres aforesaid; the same to be bounded by a line drawn from the corner of *Dr. Magill's* land, to *Young's* north-west corner, running nearly as the fence now stands, which is to be the dividing fence; subject however, to the restrictions and conditions herein after expressed. I give and devise to my daughter, *Eliza D. Bowie*, her heirs and assigns forever, all the land purchased of *Mr. Contee*, called *Ranelagh*. I give and devise to my son, *William D. Bowie*, his heirs and assigns for ever, ten acres of land purchased of *Henry L. Hall*. I give and devise to my son, *Walter B. Bowie*, his heirs and assigns for ever, twenty acres of land purchased of *Mr. Ogle*. I give and devise to my beloved wife, for and during her natural life, the remaining half of my lands, purchased of *Walters* and *Clark*; and also, all the remainder of the lands formerly *Norwood's* and *Falconer's*, lying to the eastward of the line before mentioned, drawn from *Dr. Magill's* corner, to the corner of *Mr. Young's* land; and after her decease, I give and devise the same to my son, *Richard D. Bowie*, his heirs and assigns forever.'

'It is my desire and will, that my wife and daughters, and her son, shall have a home at my mansion house, until my son *Walter* shall arrive to the age of twenty-one years; peaceably to be enjoyed by them, without interruption or molestation of my son *Walter*; and if he should make claim and disturb them in their enjoyment of said home, then it is my will, and I do hereby declare void and of no effect, the devise to him herein before made. And it is further my will, that all the property be kept together, and worked by the family slaves, until my son *Walter* shall arrive to full age; for the support of the family; the whole of the net profits, after payment of my debts, to be equally divided between my children, *Eliza*, *Walter*, *Kitty*, and *Richard*. I give and bequeath all my furniture, to my wife, and my five children, specifically, share and share alike. I give and bequeath to my wife, the following negro slaves, viz: *Jerry*, *Little Jerry*, *Ben*, *Reuben*, and *Cato*, and *Rachael* and *Milly*, that came by his wife, and *Maria*. All the residue of my personal estate, I give and bequeath to my wife and her son, and to my children, *Eliza*, *Walter*, and *Kitty*, specifically, share and share alike. And lastly, I do hereby ap-

point my son, *William D. Bowie*, and my friend, *John Contee*, Esq. joint executors of this my last will and testament.'

The bill further states, that soon after making this will, *William Bowie*, of *Walter*, died; that on the 15th of September, 1826, it was proved according to law, and letters testamentary granted to the executors, these defendants *William D. Bowie* and *John Contee*, who took possession of, and have used and cultivated the testator's real and personal estate; that the testator, at the time of his death, left a widow, the defendant *Ann*, and the defendants *William*, of full age, and *Walter* and *Kitty*, and the plaintiff *Eliza*, his children by his former wife, the daughter of the testator *Baruck*, and the defendant *Richard*, a child by his second wife, the defendant *Ann*, who were infants under twenty-one years of age; that the executors have fallen into several errors as to the true construction of the will of their testator, and have accordingly applied it to the prejudice of the plaintiffs; that the family have resided at the mansion house, and have been supported out of the profits of the estate, as directed by the will of the testator *William* until some of the children were sent out to school, and that the executors had made no allowance to the plaintiff *Eliza* for her maintenance, &c. Whereupon the bill prayed that the will of the testator *William* might be carried into effect under the direction of the court; that the executors might be ordered to account, and that the plaintiffs might have such other relief as the nature of their case might require.

On the 10th of July, 1829, the defendants *William D. Bowie* and *John Contee* put in their joint answer, in which they admitted the marriage of the plaintiffs and the wills of the testators *Baruck* and *William*; that they had obtained letters testamentary under the will of the latter; had taken possession of his estate, and settled with the Orphans Court accordingly; that the real and personal estate of the testator *William* had been kept together, and the family supported as directed by his will, &c.

The defendant *Ann D. Bowie*, on the 29th of September, 1829, put in her answer, in which she referred the court to the two wills for their true construction; and in regard to the personal estate of her deceased husband referred to the accounts of his executors, passed by the Orphans Court, and submitted the claims of the plaintiffs to the decision of the Chancellor. On the same day the infant defendants filed their answers by their guardian *ad litem*, in which they say that they have no particular knowledge of the

matters stated in the bill, pray that their interest may be protected, and leave the plaintiffs to prove their case.

After which the case was brought before the court, and with the consent of the solicitors of the parties, the following decree was passed.

2d October, 1829.—BLAND, Chancellor.—*Decreed*, that this case be, and the same is hereby referred to the auditor, with directions to take an account of the estate of the late *William Bowie*, of *Walter*, which has come into the possession of the defendants *William D. Bowie* and *John Contee* as his executors or otherwise. And that the auditor also report the gross value, and annual value of the estates of *Baruck Duckett*, deceased, which, by his last will and testament, was devised to *William Bowie*, of *Walter*, deceased, for life, with the power of appointing or disposing of the same to and amongst his children, and of the several parcels thereof which are devised or disposed of by the last will and testament of said *William Bowie*, of *Walter*, deceased. And also the gross value and the annual value of the estate of the said *William Bowie*, of *Walter*, deceased, and of the several parts or parcels thereof, which are devised by his last will and testament to and amongst his children respectively. And also the amount of the debts of the said *William Bowie*, of *Walter*, deceased, which yet remain unsatisfied. And the said auditor is also required to report the ages of the widow and children of the said testator, and what would be proper allowances to be made for the support of the testator's family, and the complainant *Eliza*. And whether it would be to the interest and advantage of the said defendants *Walter* and *Kitty* to take under the will of their grandfather, or under the will of their father. And the auditor is required to state such other accounts, and report such other facts and circumstances in relation to the matters in issue, as may be required by either party. And shall make his report from the evidence already in the case, and such other testimony as shall be produced before him by either party, on giving the usual notice. And either party shall have liberty to take depositions of witnesses before a justice of the peace, on giving three days' notice thereof to the adverse party, or their counsel. All equity to be reserved for final hearing.

After which, the auditor, by his report bearing date on the first day of May, 1830, says, that in obedience to this decree, and after the usual notice to all the parties, he had attended at his office,

and taken the depositions of witnesses, and among others, the depositions of the defendants *William D. Bowie* and *John Contee*, who, by an order passed on the 14th of January, 1830, were allowed to be examined, subject to all just exceptions.

The auditor further says, that he had examined the proceedings, and supposes, that the real estate which was devised by *Baruck Duckett* to *William Bowie*, of *Walter*, and which he devised to his children, *Walter* and *Kitty*, is to be treated as parcel of 'all the property' devised by the testator *William*, to be kept together and worked by the family slaves, until *Walter's* arrival at age, for the support of the family. He also supposes, that the negroes devised by the testator *Baruck*, to the younger children of the testator *William*, to vest on their arrival at age; and which are now retained by the executors of the testator *William*, as the shares of the infants *Walter* and *Kitty*, are to be treated as part of the estate of the testator *William*, until their arrival at age; and their profits until that period, are to be accounted for as parcel of said estate. Assuming these positions, the auditor has stated an account between the executors of *William*, and his estate, in which they are charged with the balance of the personal estate in their hands, at the date of their last administration account, and with the appraised values of the aforesaid land and negroes to the first day of January last; and are allowed ten *per cent.* commission on the amount of the inventory of the personal estate returned by them; and the additional property and profits accounted for by them, and five *per cent.* commission on the amount of debts collected; from which account, there appears in the hands of the executors, a balance of \$12,223 48; consisting in the whole, or for the greater part, of specifics. The executor *William D. Bowie*, in his deposition, estimates the amount of the outstanding debts at \$9,000. But no claim, except that of the plaintiff's, which is stated and returned herewith, has been exhibited; nor have the creditors been notified to produce their claims. The auditor, is therefore, unable to make any appropriation of the balance in the hands of the executors.

The auditor further reports, that by the last will of the testator *William*, 'all the property' is devised to be kept together and worked, until his son *Walter's* arrival at age, for the support of the family; and the net profits, after payment of the testator's debts, are to be divided amongst his children, *Eliza*, *Walter*, *Kitty* and *Richard*. And after several specific legacies, 'all the residue'

of his 'personal estate' is bequeathed to his wife, and the before named children. The auditor supposes that the testator's debts are charged in the first instance, upon the profits of the estate; and that as between the legatees, the personal estate is liable only in the event of a deficiency of profits to satisfy that charge. In strictness then, the accounts of the administration of the personal estate should be kept distinct from the accounts of the profits of the whole estate. But upon examination of the account passed by the executors, and of the testimony, he is satisfied, that no advantage can result from such a separation, which would compensate for its increased expense; as the amount of the testator's debts will greatly exceed the net profits, which under the most favourable circumstances, might be derived from the estate. The auditor has, therefore, for the present, adopted the accounts as passed by the executors; and proposes, in the future distribution of the balance in the hands of the executors, to treat the same as the residue of the testator's personal estate.

The auditor further reports, that the real estate of the testator *Baruck*, which he devised to the testator *William*, for life, was worth, at the time of the death of the testator *William*, the sum of \$22,433 33; and is of the same value at the present time; and the average annual values thereof, at the aforesaid periods, are estimated at four *per cent.* on the gross values, or \$897 33. That the devise to *Kitty Bowie*, includes about one hundred and fifty acres of land of said estate, which is supposed by *William D. Bowie*, in his deposition, to be worth \$30 per acre, or \$4,500, at the aforesaid periods; and the average annual values at said periods, are estimated at four *per cent.* on the gross values, or \$180. That the devise to *Walter B. Bowie*, includes about three hundred acres of said estate, worth \$50 per acre, \$15,000, and about two hundred acres, worth \$10 per acre, \$2,000, making \$17,000; and the annual values thereof, as aforesaid, are estimated at four *per cent.* or \$680.

The auditor further reports, that the depositions of *Samuel Sprigg*, *Robert Bowie*, *Notley Young*, and *John Contee*, are indefinite and unsatisfactory, as to the value of the real estate of the testator *William*. The deposition of *William D. Bowie*, is more particular, and the auditor has adopted his estimates of the value of said estate. The accompanying statements shew that the real estate of the testator *William*, was, at the time of his death, and is at the present time, worth \$49,250; and the average annual

values thereof, at said periods, are estimated at four *per cent.* upon the gross value, or \$1,970; and that the residue of the personal estate of said deceased, is worth \$20,935 70. That the real estate devised to *Walter B. Bowie*, may be valued at \$6,200; and the annual value thereof, at \$248; and the personalty devised to him, is valued at \$4,187 14. That the real estate devised to the complainant *Eliza*, may be valued at \$15,750; and the annual value thereof, at \$630; and the personalty devised to her, is valued at \$4,187 14. That the real estate devised to *Kitty Bowie*, may be valued at \$8,400; and the annual value thereof, at \$336; and the personalty devised to her, is valued at \$4,187 14. That the real estate devised to *Richard D. Bowie*, may be valued at \$18,900; and the annual value thereof, at \$756; and the personalty devised to him, is valued at \$4,187 14.

The auditor further reports, that from the testimony, it appears, that *Ann D. Bowie*, the widow of the deceased, was at that time, forty-five years of age; that the complainant *Eliza*, was twenty-one years of age; that the defendant *Walter*, was eighteen years of age; that the defendant *Kitty*, was fourteen years of age; and that the defendant *Richard*, was five years of age. That a reasonable allowance for the support of the testator's family, residing at the mansion house, would be the sum of \$1,000 *per annum*; that the sum of \$593 75 *per annum*, would be a reasonable allowance for the maintenance and education of the defendant *Walter*, who is now at a boarding school; that the sum of \$468 75 *per annum*, would be a reasonable allowance for the maintenance and education of the defendant *Kitty*, who is now at a boarding school. And that the sum of \$443 75 *per annum*, would be a reasonable allowance for the maintenance of the complainant *Eliza*. And as no moneys have been advanced to her since her marriage, the auditor reports, that the sum of \$695 21 would be a reasonable allowance to be made to the complainant for her maintenance, from the time of her marriage to this date.

The auditor further reports, that it will be the interest and advantage of the defendants *Walter* and *Kitty*, to take under the will of their father. The testator *Baruck*, devised certain lands to the testator *William*, for life, with a power to devise it to certain of his children; and also bequeathed one-third of his negroes and stock of all sorts, to the younger children of the testator *William*, by his then wife. The testator *William*, after referring to the will of the testator *Baruck*, devised those lands to his son *Walter*, and

his daughter *Kitty* ; and then declared, that his wife and daughters, and her son, should have a home at his mansion house, &c. The auditor understands, that the guardian for the said *Walter* and *Kitty*, contends, that the last will of *Baruck Duckett*, deceased, conferred on the testator *William*, a power of appointment merely ; and that the said *Kitty* and *Walter*, as his appointees are seized of the absolute fee simple of the real estate of the said *Baruck*, freed from the charges for the payment of debts and support of the family, which the testator *William*, has attempted to impose thereon. The other devisees of the testator *William*, insist, that the said *Walter* and *Kitty* cannot claim the aforesaid real estate, in any other manner than as it is devised to them ; or if they can and will claim the said real estate, free from the aforesaid charges, then they must abandon all other benefit which might otherwise accrue to them from the will of their father.

And, in conclusion, the auditor further reports and observes, that the question of election is then supposed to be, whether it will be more to the advantage of the said *Walter* and *Kitty*, to take an unincumbered fee simple in the said real estate, than to take the same with the charges imposed by the will of their father, and the benefits conferred on them by that will. As to the defendant *Kitty*, it is clearly for her interest to take under her father's will. Her share of the real estate of her grandfather *Duckett*, is valued at \$4,500. The real estate devised to her by her father, is valued at \$8,400 ; and the personal estate at \$4,187 14. The income which she might derive from the estate of her grandfather, is estimated at \$180 *per annum*. Her expenses, which have been charged upon, and have been defrayed out of the profits of the aggregate estate, are estimated at \$468 75 *per annum*. The real estate of the said *Baruck Duckett*, deceased, which is devised to the said *Walter* by his father, is valued at \$17,000. Its annual income is estimated at \$680. The father having died in 1826, and the charges for payment of debts, and support of the family, being limited to the said *Walter's* arrival at age, which will happen in 1832, the value of those charges may be estimated at \$4,080. His expenses, which are charged upon and have been defrayed out of the profits of the aggregate, are estimated at \$593 75 *per annum* ; or for the term aforesaid, at \$3,562 50. The realty devised by the father, is valued at \$6,200 ; and the personalty at \$4,187 14 ; making the advantages to be derived from the father's will, amount to \$13,049 64. All which, is respectfully submitted.

The complainants excepted to this report and accounts of the auditor; *first*, because they admit the claims of *Walter* and *Kitty Bowie* to two-thirds of certain negroes devised by *Baruck Duckett* to the other children of *William Bowie*, of *Walter*; *second*, because they assume, that said two-thirds is to be used, and their profits accounted for as parcel of said *Bowie's* estate; and *third*, because they make no allowances to the said other children for the services of said negroes so bequeathed to them from the death of said *Duckett*.

The defendants excepted to so much of this report and accounts of the auditor as allow to the complainants hire for the negroes left to her by *Baruck Duckett* before the arrival of her brother *Walter* at the age of twenty-one years; because, under the will of her father, *William Bowie*, to which the complainants are understood to assent, and under which they make claim to all the property left thereby to the complainant *Eliza*, the said negroes were to be retained and worked by his executors for the benefit of the whole estate: nothing, therefore, can be claimed by the complainants for their hire; *second*, they except also to an allowance being made for the maintenance of said *Eliza*; because of the provision made for her at the mansion house; and *thirdly*, they except to any allowance to the complainants of any part of the profits of the estate which the defendants *Walter* and *Kitty* claim under the will of their grandfather *Duckett*, and the appointment by their father *William Bowie*, as stated in the proceedings; because the said *Walter* and *Kitty* are entitled to claim the same, and will hold the same, under the will of their grandfather; and will hold the same absolutely. The will of *William Bowie*, their father, does give them the same, and could not, and it is contended does not subject it to any incumbrances, charges, or conditions.

28th June, 1830.—BLAND, Chancellor.—Having disposed of the previously argued cases, I this day opened the bundle of papers of this case, which was argued on the 1st instant, and find that there are several reports and papers not marked filed, which I take it for granted the parties deem important, and wish to have considered as a part of the proceedings in this case.

Upon which I would observe, that it has been the regular course of this court during the provincial government, and thence down to the present time, to mark as filed all pleadings, exhibits and papers, more especially the reports from the regular or any special auditor, as of the day on which they are lodged in or returned to the Chancery office. All bills, except such as pray for an injunc-

tion to stay waste or proceedings at law, are required, by a statute passed in the year 1705, to be filed before a *subpæna* can be issued. (a) And all other pleadings must be put upon file before they can be noticed; and can only be taken off the file by the express allowance or direction of the court. (b) So long ago as the year 1692, by a rule of the English Court of Chancery, which has been ever since followed here, every report of a master or auditor is required to be filed within four days after it is signed, or at least before any proceedings are had thereon. (c) And all depositions, exhibits, and documents, intended to be used, in any way, must be filed before they can be regarded as a part of the proceedings, or in any manner noticed by the court. (d) This course is in all cases proper and necessary to enable the register to make up a full record in an orderly and correct manner; and in many cases it is indispensably necessary as the only means of so conclusively fixing dates as to enable the Chancellor to decide correctly. The ancient and well established course of the court must be in every particular punctually observed. The Chancellor has often explained and complained as to this matter; yet he is satisfied, that, in this instance, there has been no intentional departure from the proper course.

Whereupon it is *Ordered*, that this case stand over, and after such of the now loose papers shall have been marked filed as the parties may think proper to have put upon the record, that the register return the bundle to the Chancellor.

After which the report of the auditor, with the depositions and

(a) 4 Ann. c. 16, s. 22; Kilty's Rep. 245—1714 *PER CURIA*. *Ordered and Ruled*, that all bills filed in the Chancery office, be filed before *subpæna* issue, according to the statute of the fourth and fifth of Queen Anne, in such case made.—*Chancery Proceedings*, lib. P. L. fol. 84.—(b) Beam's Order, 168, 240; Curzon v. De La Zouch, 1 Swan. 185.—(c) Beam's Orders, 293; Eyles v. Ward, 2 P. Will. 517.—(d) Beam's Orders, 46, 110.

11th February, 1793.—HANSON, Chancellor.—*Ordered*, that hereafter, no *subpæna* issue on any bill or petition referring to any deed, writing or paper, as an exhibit, and praying that the same may be taken as part of the bill, until such deed, writing or paper be actually exhibited and filed. N. B. If a bill refer to an exhibit which is not filed, there can be no grievance in denying a *subpæna*, because the party has it in his power to strike out the reference, and therefore, to obtain the *subpæna*. [See also the revised rules of March, 1817, No. 3.]

ENNALLS v. BOND.—17th July, 1800.—HANSON, Chancellor.—A reference to papers or records, of which neither the originals nor copies are filed in the cause, are altogether improper; and no paper which is not exhibited and filed in a cause, ought to have any influence on the decision.—*M. S.*

documents by which it was accompanied, were severally marked filed as of the 7th of May, 1830, and the case was thereupon again submitted.

10th July, 1830.—BLAND, *Chancellor*.—This case standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

The difficulties here presented arise from the different constructions given by the parties to two wills under which they claim. The first of them is that of the late *Baruck Duckett*, and the matter, as to it, turns upon what shall be considered as the true meaning of four of its clauses, the first of which is in these words :

‘I give and devise to my son-in-law, *William Bowie*, of *Walter*, the plantation whereon I now dwell, likewise the lands called the *Jeremiah and Mary*, and the resurvey on the *Jeremiah and Mary*, and ten acres of the land purchased of *Henry L. Hall*, to be laid off at the north end, during his natural life only. In case the said *Bowie* should die before his wife *Kitty*, she has hereby a right to remain on, to occupy and enjoy all the aforesaid lands during her natural life. If either the aforesaid *Bowie* or his wife *Kitty*, should cut down, or suffer to be cut down the enclosed woods below my dwelling-house, for cultivation, their title to cease and be void for ever. I hereby authorize the said *Bowie* to designate any one or more of his children by his wife *Kitty*, who shall have the fee simple in all the aforesaid lands : my will being, that the fee should pass to all or any one of them in the discretion of their father ; creating this uncertainty of designation merely as a motive to good conduct in them all.’

With regard to this clause it is sufficiently clear, that *William* had an estate for life given to him, with remainder of an interest for life to his then wife *Kitty*, in case she should survive him. The power given to the devisee *William* to designate which of his children should take after himself and their mother, cannot, it is true, be considered as enlarging his estate in any respect whatever. It is a mere power to specify the course which the fee simple should take after his death, and nothing more. But then, when contemplated with reference to the persons among whom the selection was to be made, it is as to them, almost the same as if the holder of the power had been actually vested with an absolute estate in fee simple ; because, as to each of those persons, the power, in the full scope of its exercise, ranges without control from nothing to the whole. And it is allowed to be arbitrarily exercised, be-

cause of its being committed to the hands of a parent, as a motive to good behaviour from his children.

The three following clauses of this same will must be considered together; they are in these words: 'I give and bequeath to my son-in-law, *William Bowie*, of *Walter*, one-third of my negroes. The whole of my negroes to be valued by two impartial men, not related to either side, and divided into three classes, as equal in value, considering age and sex, as can be; and then each class to be distributed by lot. The first number giving the first choice; the second number giving the second choice; and the third number giving the third choice. But in case *William Bowie*, of *Walter*, should set up a claim to any of the negroes, at either place, more than then at the Quarter, he and his wife to be barred from any right or title to my real estate. Also, one-third of my stock of all sorts, to be valued, classed, and distributed as the negroes aforesaid; likewise all my household and kitchen furniture, except what I bequeath hereafter, I give to my said son-in-law, *William Bowie*, of *Walter*.'

'I give and bequeath to my grandson, *William D. Bowie*, one-third of my negroes, and one-third of my stock of all sorts; all my plate; one eight-day clock; two large looking-glasses; two feather beds and their furniture.'

'I give and bequeath the other third of negroes and stock of all sorts to the rest of the children of *William Bowie*, of *Walter*, by his present wife *Kitty*, as they arrive at age, or marry, share and share alike. I mean the age of sixteen, for girls.'

From the terms in which these donations are made it is perfectly clear, that the legatee of neither class was to derive any advantage from the negroes thus appropriated among them, more than was expressly given. *William Bowie* could not have the use and profits of any more than the class which might by lot fall to him. The profits of the third given to his son *William D. Bowie* certainly vested in him at once; and so, too, the profits of the other third, which were awarded by lot to the rest of the children vested in them as a specific legacy.

A father is bound to maintain his infant children, if able, (e) and, therefore, nothing is ever allowed to him for that purpose out of the infants' peculiar estate, unless upon special grounds. It

(e) 2 Inst. 112; *Harvey v. Harvey*, Barnard, C. Rep. 107; *Butler v. Butler*, 3 Atk. 60; *Rawlins v. Goldfrop*, 5 Ves. 444.

does not appear that *William*, the father, ever claimed any allowance for the maintenance of these, his infant children, out of the legacy given to them; nor has it been shewn that his fortune was not amply sufficient to maintain all his children; or that there were any special circumstances upon which he could have rested such a claim of an allowance for maintenance out of the legacy of negroes and stock given to his infant children; therefore no such allowance can be made. And as the negroes were held for them, by their father, as their natural guardian, he must be held accountable to them for their profits accordingly. (f)

By the last of these three clauses of the will of the testator *Baruck*, the legacy of the one-third of the negroes is given to the rest of the children as they arrive at age; that is, sixteen for girls. And consequently this one-third of the negroes vested in equal shares in each of these children, who were in being when the eldest of them reached the age designated by this testator as the point of time when the whole of that third should vest and be distributed. Before that time all these children of this testator's daughter *Kitty* had come into being; and, therefore, this one-third of the negroes, with their profits so vested in them at that time, must be awarded to them accordingly. (g)

The second of these wills is, that of the late *William Bowie*, of *Walter*. There are several provisions of this will, not now necessary to be considered; but those clauses of it which have been the principal causes of involving these parties in this controversy are expressed in the following words:

'My father-in-law, the late *Baruck Duckett*, having devised his dwelling plantation to me during life, and also the land called *Jeremiah and Mary*, and the resurvey thereon, with power and authority to me to designate any one or more of my children by his daughter, and to devise it to them in fee at my discretion, I do devise the same to my son *Walter Baruck Bowie* and my daughter *Kitty*, their heirs and assigns forever, in the following proportions, that is to say, to my daughter *Kitty Bowie* I give and devise three hundred and fifty acres of my dwelling plantation, to be laid off in convenient and proper form at the corner of my plantation next adjoining the lands of my brother *Walter* and *Gabriel Duvall*, to

(f) *Jackson v. Jackson*, 1 Atk. 514; *Hughes v. Hughes*, 1 Bro. C. C. 387; *Hoste v. Pratt*, 3 Ves. 733; *Collis v. Blackburn*, 9 Ves. 470; *Errington v. Chapman*, 12 Ves. 20; *Maberly v. Turton*, 14 Ves. 500; *Jervoise v. Silk*, Coop. Rep. 52; 1816, ch. 203, s. 1.—(g) *Barrington v. Tristram*, 6 Ves. 345.

her, her heirs and assigns forever. And I give and devise to my said daughter, her heirs and assigns forever, one-half the lands which I own, and which were purchased of *Robert Waters* and _____ *Clark*.'

'I give and devise to my son *Walter B. Bowie*, his heirs and assigns forever, all the residue of the lands devised as aforesaid by *Baruck Duckett*, except ten acres purchased of *Henry L. Hall*, and all the residue of my dwelling plantation, except the three hundred and fifty acres aforesaid; the same to be bounded by a line drawn from the corner of *Dr. Magill's* land to *Young's* north-west corner, running nearly as the fence now stands, which is to be the dividing fence, subject, however, to the restrictions and conditions herein after expressed.'

'I give and devise to my daughter, *Eliza D. Bowie*, her heirs and assigns forever, all the land purchased of *Mr. Contee*, called *Ranelagh*.'

'I give and devise to my son *William D. Bowie*, his heirs and assigns forever, ten acres of land purchased of *Henry L. Hall*.'

'It is my desire and will that my wife and daughters and her son shall have a home at my mansion house until my son *Walter* shall arrive to the age of twenty-one years, peaceably to be enjoyed by them without the interruption or molestation of my son *Walter*; and if he should make claim, and disturb them in their enjoyment of said home, then it is my will, and I do hereby declare void and of no effect, the devise to him herein before made. And it is further my will, that all the property be kept together and worked by the family slaves until my son *Walter* shall arrive to full age, for the support of the family; the whole of the net profits, after payment of my debts, to be equally divided between my children *Eliza, Walter, Kitty* and *Richard*.'

If a testator, by his will, appropriates an amply sufficient portion of his real estate, in a proper and accessible manner, for the payment of his debts, such an appropriation is valid, and his creditors must take it as given, and cannot have any other part of the realty sold and applied for their satisfaction. (h) With regard to the personalty, it is so generally and absolutely subject to the payment of debts, that a testator can, in no way, remove any portion of it out of the reach of his creditors. But then, as regards legatees, a part of the realty; or, as in this instance, the profits of

(h) 3 W & M. ch. 14; *Hughes v. Doulben*, 2 Bro. C. C. 614; S. C. 2 Cox, 170.

the realty may be directed to be applied to the payment of debts in aid or relief of the personalty out of which the legacies are given; in which case, at the instance of such legatees, such a testamentary appropriation may be carried into effect, but without prejudice to creditors. (i)

Here, the testator *William*, clearly contemplated the payment of all his debts in the first place, before his estate should, or indeed, could be distributed in the manner he prescribed. It is shewn, that he left a large amount of debts unsatisfied; and it also appears, that his executors have not yet finally settled up his estate; and that his creditors have not been called upon to bring their claims before this court for adjustment and satisfaction.

This is a bill by a legatee and devisee, to have the estate of the testator *William*, distributed, in order that she may thus obtain that portion of it, to which she is entitled. This, it is manifest, cannot be effected, until the creditors of the deceased have been called in and satisfied. A legatee, by a bill of this kind, has a right to call for a final settlement of the testator's estate; and, in order to accomplish that object, as the only means of getting his legacy clear of all incumbrance, he has a right to have his bill filed for that purpose, treated as a creditor's bill, as regards the creditors of the testator, and to have them notified to bring in their claims. I have had occasion lately, and sufficiently to explain the reasons and grounds of my opinion upon this subject. (j) In this case, there can be no final distribution made of this estate, until after the expiration of the time allowed to the creditors to bring in their claims. And consequently, a notification to the creditors, is the first thing that must now be directed to be done.

This case has been treated in the argument, as one in which the testator *William*, had put his children, by his wife *Kitty*, to an election to take under, or in opposition to his will. And I think there can be no doubt, that it is one of that description. But it is a case of election, accompanied by very peculiar circumstances. The power given by the testator *Baruck*, to his son-in-law, is confined exclusively to the real estate; and as to that estate, extends only to a mere choice among certain persons; one, or some, or all of whom, were to take at all events. If the testator *William*, and his wife *Kitty*, had had only one child at the time of *Kitty's* death,

(i) *Clarke v. Ormonde*, 4 Cond. Cha. Rep. 50.—(j) *Hammond v. Hammond*, ante 316.

then, as there could have been no choice, the power would have been thus virtually extinguished. Such only child could not have been put to an election under such a testamentary provision, and the right to put to an election, must have rested upon general principles, independently of that power. There being in fact, however, a plurality of such children, no exercise of the power which merely gave the whole of the lands derived from the testator *Baruck*, to all or any of those children, could be questioned by any one of them, in opposition to the others, or in derogation of the will of their father; and therefore, the testator *William*, by no exercise of his power, which went no further than to dispose of the land to which it applied, among those children, could leave them any right of election.

But it will be seen by the comparative view of the actual operation of these two testamentary acts, as exhibited by the report of the auditor, that the testator *William*, has devised to his son and daughter, *Walter* and *Kitty*, other lands, in addition to portions of that derived from their grandfather, and has also bequeathed to each of them, a large amount of personal property; that the testator *William*, speaks of the land derived from the testator *Baruck*, as his, the testator *William's*, dwelling plantation, and then gives to his wife and daughters, and her son, a home at his mansion house, until his son *Walter* should attain his full age; and directed that all the property be kept together, and worked with the family slaves; and that the profits, after the payment of his debts, be divided, &c. Here, so far as the donations of other property, not derived from the testator *Baruck*, and also of a home, and the charge for payment of debts, affects the lands and slaves held under the testator *Baruck*, by incumbering them and their profits with a habitation right, and the payment of the debts of the testator *William*, or by withholding them temporarily from his children, by his wife *Kitty*, are directly at variance with, and go beyond a mere execution of the power given by the will of the testator *Baruck*, they do most manifestly put the testator *William's* children, by his wife *Kitty*, to an election, to take under or in opposition to his will. And those of the testator *William's* children, by his wife *Kitty*, who are now of full age, have all of them elected to take under their father's will accordingly.

With regard to the infants who have been also put to their election, I am of opinion, that in the situation of this case, the court may, and ought to elect for them; and that in doing so, it must be guided altogether with a view to the benefit of the infants, on a

consideration of all circumstances. (*k*) A reference has been made to the auditor, for the purpose of collecting information upon this subject; and the facts and statements reported by him, have not been questioned. From those statements, there can be no doubt, that it will be greatly for the benefit of the infants to take under the will of their father, in so far as the property given to them by their grandfather, has been embraced within the terms of the election, offered to them by the will of their father, which particularly describes the real estate, and also sufficiently specifies the negroes, as being then a part of the 'family slaves.' I shall, therefore, in behalf of these infants, elect that they shall take entirely under the will of their father, the late *William Bowie*.

But the one-third of the negroes given by the testator *Baruck*, upon his death, immediately vested in the rest of the children of his daughter *Kitty*, to be distributed when they should arrive at age, that is, in these parties, *Eliza*, *Walter*, and *Kitty*. This specific legacy to them was the immediate gift of a fund, with all its produce. The testator *William*, as their father and natural guardian, might well take and hold these negroes for them; but in doing so he made himself accountable to them for their profits. Consequently, the amount of those profits which had accumulated in his hands, during his life-time, was a debt due from him to them, it was a part of their property in his hands. But it has been in no way disposed of by him; he has not described, or even alluded to it as a part of that mass of property, by the special disposition of which he has expressly or impliedly driven them to elect to take under or against his will. On the contrary, considering it as a debt due from him, he has, together with all others of his debts, expressly provided for its payment.

The principles of election arise out of the fact, that a party who has a right to one parcel of property, has another given to him, with an express declaration, or under circumstances which leave no room to doubt that the donor, who has disposed of both, intended he should have choice of either; but that he should not be permitted to take both of them. It is no where spoken of as arising out of the circumstance of the testator's being a debtor to his devisee or legatee. In this case the testator *William* shews that he perfectly understood the extent of his power to put some of his children to an election, by the manner in which he has dis-

posed of his property among them. He carefully describes the several parcels of property, and the various advantages between which they were to make their election; but in speaking of that property and those advantages there is not the slightest reference to the previously accumulated profits of their specific legacy of negroes then in his hands. No property has been given in lieu of those profits, or as a compensation for them; nor has any thing been placed before these parties in competition with those profits. And, therefore, it cannot be inferred that this claim for the profits of those negroes, which had been then received, and were then in hand, were intended to be embraced within the scope of that election which the testator *William* expected his children to make; for in relation to this doctrine of election, it certainly cannot be so applied as to spell or guess a man out of his property. (l)

In equity, where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, it may be presumed, in the absence of a contrary intention, that the legacy was meant as a satisfaction for the debt. The rule has not, however met with general approbation, and does not apply where the debt did not exist when the will was made, or where it was upon a negotiable security, which might be then in the hands of a stranger; or where the debt was due upon a current account, the amount of which was unknown to the testator. (m) Here the testator might well know that he was accountable to his children for the profits of the legacy of negroes which had been given to them by their grandfather; but there is no reason whatever to believe that he then knew the amount; or from any expression in his will, that he meant any bequest he made them should be considered as a satisfaction of a debt. On the contrary, he expressly refers to the will of the testator *Baruck*, and then distinctly indicates how far what he gave should control or modify any right they might deduce from the will of their grandfather, without the most distant allusion to any claim they had upon him, because of his having

(l) *Forrester v. Cotton*, 1 Eden, 532; *Blake v. Bunbury*, 1 Ves. jun. 524; *Green v. Green*, 19 Ves. 667; S. C. 2 Meriv. 93; *Tibbits v. Tibbits*, 4 Cond. Cha. Rep. 148; *Hall v. Hall*, 1 Bland, 130.—(m) *Rawlins v. Powel*, 1 P. Will. 298; *Jeffs v. Wood*, 2 P. Will. 130; *Thomas v. Bennet*, 2 P. Will. 343; *Fowler v. Fowler*, 3 P. Will. 353; *Mathews v. Mathews*, 2 Ves. 636; *Richardson v. Greese*, 3 Atk. 65; *Hinchcliffe v. Hinchcliffe*, 3 Ves. 529; *Carr v. Eastbrooke*, 3 Ves. 561; *Wathen v. Smith*, 4 Mad. 325; *Partridge v. Partridge*, 2 H. & J. 63; *Edelen v. Dent*, 2 G. & J. 185.

received the profits of their negroes. Consequently, the legacies given by the testator *William* can, in no respect, be considered as a satisfaction of this claim of his children.

I am, therefore, of opinion that the one-third of the negroes given by the testator *Baruck* to the rest of the children of his daughter *Kitty* must be regarded as a specific legacy of things which passed at the time of his death; as an immediate gift of a fund with all its produce; and that, therefore, the legatees of these negroes became entitled to their profits immediately from and after the death of the testator *Baruck*; and their father, who held these negroes, as their guardian, must be charged with the profits of them from the time of the death of the testator *Baruck* down to the time of his own death, when they passed into other hands; but more especially because by his will he put these legatees to their election as to the use of these same negroes, which then remained in his possession; and under the designation of 'the family slaves' were a part of that property he directed to be kept together for the use of the family. (n) But in making this estimate of the amount of the profits of these negroes due to each one of these legatees, it will, of course, be recollected that no one of them can be allowed any portion of the profits after she had obtained her share of the negroes themselves.

It only remains to ascertain what the testator *William* meant by the *home*, the *support*, and the *dividends* of the rents and profits he gave to his widow and younger children. In contemplating these subjects it should be borne in mind, that a man is under a moral and legal obligation to maintain his wife and infant children. They are among his highest and most honourable duties. With regard to his wife, the legal duty fastens a lien upon his property, which may be made available after his death, in opposition to any previous act of his; her dower and distributive share, being rights of which he cannot deprive her. He may, it is true, give his property totally away from his children; but the presumption of law is, that nature is sufficiently strong to bind him to his duty, in this respect also, unless there be some cogent reasons for a different course. (o)

This testator declares, that his wife and daughters and her son, shall have a home at his mansion house. The home thus given,

(n) *Kirby v. Potter*, 4 Ves. 748; *Raven v. Waite*, 1 Swan. 557.—(o) *Rawlins v. Goldfrap*, 5 Ves. 444; *Glaister v. Hewer*, 8 Ves. 206; 2 Fonb. 121.

is a local habitation, a place of residence. It is a right to have the enjoyment of a certain house, as a dwelling place. The right of habitation is confined to so much as is necessary for the habitation of him to whom it is granted, and his family. It is the donation of a privilege, so absolutely personal in its nature, that it cannot be leased or assigned to another, nor is it such an estate, as if given to several, can be separated by partition, and given to each one in severalty. The party to whom it is given, may enjoy or leave it at pleasure; but he cannot claim compensation for it from any one, unless he has been hindered in, or driven from the enjoyment of it; of which, there being here no allegation, there need be no inquiry as to the value of this bequest to any one of these legatees. (p)

The testator *William*, then proceeds to direct, 'that all the property be kept together, and worked by the family slaves, until my son *Walter* shall arrive to full age, for the support of the family.' This is a provision made by a husband and a parent, for his family; and therefore, should have a construction, at least co-extensive with what his duties were, when he was alive. His family was rightfully composed of his wife and his infant children; each of whom, as such, during his life, was entitled to a reasonable and proper maintenance from him according to his means and circumstances. Hence, it is fair to presume, that he intended by these comprehensive expressions in his will, to have his property so applied, as most effectually to accord with the duties of a husband and a parent. Being satisfied that this was the general intention of this provision, I am of opinion, that the support here directed to be given, must be such as is suitable for each legatee, having a proper regard to circumstances, and the extent of the fund so charged with their support. Therefore, with respect to the infant children, it must be construed to embrace a suitable education for each, as well as board and clothing. When a daughter marries, she ceases to be a member of her father's family, she puts off his authority, and has no longer any claim upon him for support; therefore, in this instance, no one of these infants can have awarded to her, after her marriage, any portion of that which is here given 'for the support of the family.'

The testator *William*, it is evident, intended that the property

(p) Co. Litt. 122, a.; Ayliffe, Civil Law, b. 3, tit. 7; Domat, b. 1, tit. 11, s. 2; Code Napole. Civil. s. 633, 634; Warfield v. Gambrill, 1 G. & J. 503.

he had so directed to be kept together for the support of the family, should be distributed when his son *Walter* came of age; and that after that, his wife and children should each be supported exclusively from what he had given to each. The charge upon the rents and profits of the realty derived from the testator *Baruck*, was then to cease, together with the similar charge upon the negroes, derived from the same testator. And the whole of the net profits of the property which had, until that time, been kept together, and which, after the payment of his debts, should then remain, are directed to be equally divided among his children, *Eliza, Walter, Kitty and Richard*. This latter bequest of the residuum of the rents and profits is sufficiently clear.

Whereupon it is *Ordered*, that a copy of the following notification be published in one newspaper published in the city of Annapolis, and in one newspaper published in the city of Washington, once a week for three successive weeks, before the first day of September next.

ADDISON AND WIFE,	}	In Chancery, 10th July, 1830.
vs.		
BOWIE AND OTHERS,		

Ordered, that the creditors of the late *William Bowie*, of *Walter*, of Prince George's County, be, and they are hereby notified and required, to file the vouchers of their claims in the Chancery office, on or before the 10th of December next.

And it is further *Ordered*, that after the publication of the said notification, and the expiration of the time allowed to the said creditors to file the vouchers of their claims, this case be, and the same is hereby referred to the auditor, with directions to state an account accordingly. And the report of the auditor, and the exceptions thereto, heretofore filed, so far as the same are at variance with any thing herein contained, are hereby overruled.

As required by this order, notice was given to the creditors of the testator *William*, to file the vouchers of their claims. After which, the case was taken up by the auditor, and sundry statements made and reported. Upon all which, on the petition, and with the consent of all parties, the case was referred to arbitration; in pursuance of which, the arbitrators made and returned an award, by which the case was finally closed.

ANDREWS v. SCOTTON.

The surveyor of the county may be ordered to survey the lands in controversy; to take the depositions of witnesses; and to return plots.—Locations made under an order of survey, which are not counter-located, are admitted.—The mode of selling land under a decree; in such sales the court is the vendor, and retains a lien to secure the payment of the purchase money; and if the purchaser fails to pay, he may be proceeded against summarily; be sued upon his bond; and the land may be re-sold at his risk; but the sale, as reported, must be first ratified, and the purchaser must have been after that, first called on by an order to pay or shew cause.—With the consent of all concerned, the sale may be at once confirmed.—The grounds upon which a sale may be rejected, or set aside.—The court sells nothing more than the interest of the parties to the suit; and therefore the purchaser can call for no inquiry into the validity of the title.—The surveyor's fees are a part of the costs; but if he fails to have them taxed and included in the decree, as affirmed by the Court of Appeals, this court can give no relief.—A party brought before the court, under an attachment to enforce the payment of money, on producing his release under the insolvent law, may be discharged.—A party may sue on all his securities at the same time, except where the bringing of suit on one of them amounts to an abandonment of his rights to have recourse to the others.—A mortgagee cannot sue upon the bond for his debt, and also have a *foreclosure* of his mortgage.—In a suit to foreclose or sell, if, by a sale, the whole debt should not be paid, the court cannot pass a decree for the payment of the balance.—An appeal bond, on the decree being affirmed, becomes thereby an additional security for the debt.—No such practice prevails, or can be allowed here, as that of opening the biddings, as in England.—Commissions adjusted and allowed as between a former and a present trustee.

THIS bill was filed on the 26th of February, 1822, by *George Andrews* and *Ennion Williams*, against *Ann Scotton*, *Robert E. Scotton*, *Alice Ann Scotton*, *Stephen Scotton*, and *Ashur Foulke*. The bill states, that in the year 1819, the plaintiff *Andrews*, for the sum of \$2,100, had purchased of the plaintiff *Williams* part of a tract of land called *Duvall's Delight*, containing one hundred and forty acres; that *Andrews* had paid the whole amount of the purchase money; but had not obtained a conveyance from *Williams* of the legal title; who, however, was willing and ready to convey it as *Andrews* should direct; that soon after *Andrews* made this purchase, he sold and contracted, in consideration of the sum of \$2,100, to convey the same land to *Stephen Scotton*; who had made several partial payments at different times, leaving a balance of \$916, with interest from the date of the payments, still due and unpaid; that the purchaser, *Stephen Scotton*, had since died intestate, leaving a widow, the defendant *Ann*, and three infant children, the defendants *Robert*, *Alice*, and *Stephen*; and that letters of administration had been granted on his personal estate to the

defendant *Foulke*; that the plaintiff *Andrews* had been informed, and believed, that the personal estate of the late *Stephen Scotton* would be insufficient to satisfy all his debts, so that *Andrews* was compelled to apply for a sale of the land in order to satisfy his claim. Upon which it was prayed, that the land, or such part thereof as might be necessary, might be sold to satisfy the claim of *Andrews*; and that such other and further relief might be granted to him as might be consistent with equity.

On the 23d of March, 1822, the widow *Ann Scotton* put in her answer, in which she admits the facts and circumstances in relation to the sale as stated in the bill; and that the personal estate of the intestate was not sufficient to discharge this debt and others exhibited against it. On the same day the administrator *Foulke* filed his answer, in which he also admits the sale as set forth in the bill, and says the personal estate of his intestate, so far as the same has come to his knowledge or possession, will not be sufficient to discharge all the claims which have been exhibited against it. On the 1st of April following, the infant defendants answered by their guardian *ad litem*, and admitted the facts alleged in the bill.

5th April, 1822.—JOHNSON, Chancellor.—The said cause standing ready for hearing, and being submitted, the bill, exhibits, answers, and all other proceedings, were by the Chancellor read and considered. And the claim of the complainant, as stated in the bill, being established to the Chancellor's satisfaction, and it appearing, that the deceased *Stephen Scotton* did not leave personal estate sufficient for the payment of his just debts,

It is thereupon *Decreed*, that the real estate of the said *Stephen Scotton* in the bill of complaint mentioned, or so much thereof as shall be necessary, be sold for the payment of the costs of this suit, of the claim of the complainants, and of such other debts of the deceased as shall be established to the Chancellor's satisfaction. And it is further *Decreed*, that *Ashur Foulke* be, and he is hereby appointed trustee for making sale as aforesaid, &c. He shall then proceed to sell the said tract of land in the proceedings mentioned, either entire, or in parcels as he shall think fit, upon the following terms, *to wit*: one-third part of the purchase money to be paid at the time of sale, or on the ratification thereof by the Chancellor; one other third part of the purchase money to be paid in twelve months from the day of sale, and the remaining third part to be paid in two years from the day of sale; for the payment

of the two last instalments with interest, notes or bonds with security, to be approved of by the trustee, shall be given, &c.

Under this decree, the trustee *Foulke* on the 29th of August made a report, in which he says, that 'after having given bond and advertising the terms of the sale in two public papers agreeably to the directions of said decree, a public sale was held on the 23d day of July, when there was no more bid than \$8 per acre, which was not thought sufficient to authorize a sale; and have since sold it on the 28th day of August, 1822, as may be made appear, for \$11 per acre; the land supposed to contain one hundred and forty acres.' Upon which an order was passed on the same day, that the sale be ratified on the 10th of November following, unless cause shewn to the contrary, &c.

Samuel Anderson on the 9th of October, 1822, filed his petition, in which he states, that he contracted with the trustee *Foulke* for the purchase of the land called *Duval's Delight*, supposed to contain one hundred and forty acres, at the sum of \$11 per acre; and by the trustee's report was returned as the purchaser; that the trustee represented a piece of woodland on the north side of the tract as a part of it; that *Anderson* had since been credibly informed, and believed, that the lines of several neighbouring tracts ran into and took off the greater part of the woodland; that the location of the woodland was the principal inducement to his purchasing the tract; and is material and necessary to the possession and enjoyment of it. Upon which he prayed, that the sale as made and reported might not be ratified.

9th November, 1822.—*JOHNSON, Chancellor*.—The within petition will be heard on the 30th instant; provided a copy thereof, and of this order, be served on the said *Ashur Foulke* before the 16th instant. It is further *Ordered*, that depositions taken before any justice of the peace on three days' notice thereof to the parties, or their solicitors, be read and received as evidence at the hearing.

To this petition of *Anderson's* the trustee *Foulke*, on the 4th of December, 1822, put in his answer, on affirmation, in which he avers, that he never shewed or made any representation to *Anderson* as to the lines of that part of the tract called *Duval's Delight*, which he had sold to him; that he knew the lines at the time he made the purchase, they having been shewn to him by the sur-

veyor who was then engaged in running out an adjoining tract ; that *Anderson* voluntarily, without any misrepresentation by the trustee, had executed the written contract under his hand and seal, of which the following is a true copy :

‘Memorandum of a bargain made and concluded upon the 28th day of August, A. D. 1822, between *Ashur Foulke*, trustee appointed to sell the estate of *Stephen Scotton*, deceased, of the one part, and *Samuel Anderson*, of Anne Arundel county, of the other part, witnesseth, that the said *Ashur Foulke* hath sold to the said *Samuel Anderson*, his heirs and assigns, all that tract of land, late the property of said *S. Scotton*, deceased, as aforesaid, supposed to contain one hundred and forty acres, be it more or less, at \$11 per acre, he, the said *Samuel Anderson*, is to pay one-third of the purchase money down, and the remainder in two equal annual instalments, with interest ; for which, notes are to be given, with approved security ; and when paid, the said *Ashur Foulke* is to make and execute a title or deed, to him the said *Samuel Anderson*, his heirs and assigns for ever.’

The time for hearing this matter, with the leave to take testimony, was, by an order of the 26th of November, 1822, extended to the second day of January following. After which, the case was again brought before the court, and on motion,

8th January, 1823.—JOHNSON, Chancellor.—Ordered, that the surveyor of Anne Arundel county, lay down any land that may be directed by either of the parties, for the better illustration of the matter in controversy ; and to ascertain the land and the quantity thereof, that was sold by the trustee. And that depositions be taken on the survey, that either of the parties may direct.

Under this order the surveyor laid down the lands as directed, and on the 19th of March, returned a plot and certificate of the surveys he had made ; and the parties having filed sundry depositions taken under the previous order, the matter was brought on for hearing.

17th April, 1823.—JOHNSON, Chancellor.—It is alleged by the petitioner, that *Ashur Foulke*, the trustee, under a decree for the sale of the real estate of *Stephen Scotton*, sold to the petitioner, part of a tract of land called Duvall’s Delight, supposed to contain one hundred and forty acres, at \$11 per acre ; that at the time of the sale, the trustee represented a piece of woodland, on the north side of the said tract of land, as part of the said tract called Du-

vall's Delight; that he believes, that the lines of the several neighbouring tracts of land, run into and take off a great part of the woodland; and that the woodland was the principal inducement to his purchasing. As the property did not, according to the allegations contained in the petition, correspond with the representation made by the trustee, it is prayed that the sale may be set aside or annulled.

Preparatory to a decision, an order passed for laying down the land that was sold, as well as any other land that might be deemed by the parties necessary for the illustration of the matter in controversy.

On examining the plot returned by the surveyor, it appears, that the trustee has laid down the land which he sold to the petitioner, and this location is not counter-located; and therefore, admitted to be the land purchased. The quantity is one hundred and forty-one and three-quarter acres, of which, three roods are within the lines of a deed executed by *Charles Carroll* to *Humphrey Hogan*, on the 16th of July, 1723.

It seems to appear, that *Charles Carroll* was the owner of the whole of the tract of land, which was conveyed by him to different persons; and before it can be known whether the three roods are the property of those claiming under *Hogan*, or belonging to the estate of *Scotton*, it is necessary to see the other transfers; and if *Hogan's* title is the eldest, yet a title to it may have been acquired by possession; for as it is laid down as a part of the land sold, it is to be presumed, *Scotton* was in possession at the time of his death.

Where a tract of land is sold, and it turns out to be materially variant from the representation, the contract may be set aside. Where a tract is sold as containing a given quantity of acres, when it is discovered that less is included than was conceived at the time of the sale, a deduction will be made, unless the deficiency shall be such as would have prevented the contract, if known at the time of the purchase; that is, the deficiency appearing to be in that part which was the chief inducement to the purchase. But in this case, in every respect, the petitioner has failed to support his allegations. He has not proved that the trustee represented to him, that he sold a piece of woodland, as part of Duvall's Delight, which is included in the lines of neighbouring tracts. He has laid down no interfering tract whatever; nor if the right of the trustee to sell three roods, did not exist, and it could not exist unless it was

owned by *Scotton* at the time of his death, has he proved that those roods of land were the inducement to the purchase. The sale made by the trustee, is therefore, ratified and confirmed, and the petition dismissed with costs.

From this order, *Anderson* appealed; and no objection being made, the Court of Appeals, on the 16th of July, 1825, affirmed the Chancellor's order.

After which, the trustee *Foulke*, by his petition, on affirmation filed on the 12th of January, 1826, stated, that he had served a copy of the decision of the Court of Appeals, on *Anderson*, and had demanded of him payment, and that he should complete his purchase, which he had refused to do. Whereupon, the trustee prayed for an attachment.

Upon which, on the next day, an attachment was ordered as prayed, returnable to the first day of March term then next. The writ was issued accordingly, and *Anderson* having been brought before the court under it, the trustee prayed that he might be committed.

But *Anderson* had previously, on the 16th of March, 1826, put in his answer on oath, in which he alleged that it did not appear, by the trustee's report, that he, *Anderson*, was the purchaser of the land; that in consequence of the irregularity of the proceedings, a good title could not be conveyed to him by the trustee; that he, *Anderson*, had not been put into possession of the land, and he believed that the trustee could not give him the possession, the land being in the occupation of a certain *Joseph Marriott*; that a copy of the decretal order of the Court of Appeals had not been served on him, *Anderson*; that he was unable to comply with the terms of the decree, and that the Court of Chancery had no power to give the relief asked for by the trustee.

17th March, 1826.—BLAND, Chancellor.—The petition of *Foulke*, the trustee, with the answer thereto of *Anderson*, the purchaser, standing ready for hearing, and the solicitors of the parties having been heard, the proceedings were read and considered.

It does not sufficiently appear that *Anderson* has ever been called upon, under any order of this court commanding him to pay to the trustee, or bring into this court the sum of money which he contracted to pay for the land sold to him, as mentioned in the proceedings; therefore, without intimating any opinion as to any other matter urged or suggested by the counsel on either side, the

Chancellor conceives that *Anderson* must be discharged from his present detention.

Whereupon it is *Ordered*, that *Samuel Anderson* be, and he is hereby discharged, without costs, from any further detention under the attachment by virtue whereof he has been brought before this court.

And it is further *Ordered*, that the said *Samuel Anderson* pay unto the said *Ashur Foulke*, the trustee, or bring into this court the sum of \$1,540, with interest thereon from the 28th day of August, 1822, until paid or brought in, being the amount of the purchase money of the land sold to him, as in the proceedings mentioned, on the 17th day of April next, or shew good cause to the contrary. Provided that a copy of this order, together with a copy of the said petition of *Foulke*, filed on the 12th of January last, be served on the said *Anderson* on or before the 25th instant.

By the answer of *Anderson*, on oath, filed on the 28th of March, 1826, shewing cause against this order, he states that the trustee, as appeared by the agreement of the 28th of August, 1822, undertook to make an absolute sale of the land, in violation of the decree, by which any sale to be made by him required the confirmation of the Chancellor; that he, *Anderson*, was not returned as the purchaser by the report of the trustee; that the quantity of the land was not ascertained by the trustee's report; that the land shewn to *Anderson* as the property to which the trustee could give title differed materially from that which the trustee was authorized to sell; that *Anderson* gave no bond or note for the payment of the purchase money; nor has any been asked of him as was required by the decree; that he had never obtained possession of the land, and believed that he could not obtain possession, it being in the occupation of a certain *Joseph Marriott*; that he, *Anderson*, was unable to comply with the terms of the sale, and that he could not, in equity, be compelled to execute the contract; or, if the trustee thought otherwise, he should file his bill in equity, or sue at law for the purchase money, when the whole case might be fully investigated, the rights of the parties conclusively established, and complete justice done to both.

By consent of parties, it was *Ordered*, on the 17th of April, 1826, that the matter stand for hearing on the first Wednesday of May then next.

12th May, 1826.—BLAND, Chancellor.—This matter standing

ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

This application has been assailed as a novelty, altogether without precedent here, and having few even of English origin, and those few of very late date, and long since our revolution. It has also been opposed upon the ground that the parties interested can only obtain redress, if, indeed, they are really entitled to any, by a bill in equity or a suit at law; in which, as it is said, the whole case can be fully investigated, the rights of the parties conclusively established, and complete justice done to both.

The defence taken in this case, if sustainable in all its consequences, appears to be destructive of some of the most valuable and important powers of this court. Controverted points, arising between the court's trustee for the sale of property and the purchaser have frequently been brought before me, since I came here; but in each instance they have been treated as insulated matters of mere practice, and have passed off in that way. This case has assumed a more grave aspect. I shall, therefore, now review the subject more at large, and upon general principles.

On considering the nature of sales under the authority of the Court of Chancery, the first inquiry which suggests itself is, who are the real parties to the contract? This very idea of a contract, implies that there is one party able and willing to contract, and another to be contracted with. It implies a perfect capacity and free will, in each of the parties to the agreement. To a contract of sale, made under a decree of this court, neither of the litigating parties can be considered as the vendor; although they, with others, such as creditors, who may be allowed to come in afterwards, may be very materially interested in the sale. The plaintiff cannot be considered as the vendor; because, oftener than otherwise, he has no title, always states his inability to sell, and prays the court to decree that a sale be made. The defendant cannot be the vendor; because he always positively refuses to part with his property, unless forced, or sanctioned in doing so by the power of the court. If then, neither of the litigating parties can be separately deemed to be the vendor, it is clear, that they cannot both together, be so considered.

But such sales are always made by an agent; in England, by a master, in this state, by a trustee. Private contracts may be made and executed in person, or by attorney; but the attorney is never considered as one of the contracting parties, he exercises no will

or power of his own, he is merely the medium or conduit through which the will of the contracting party is expressed. The master or trustee is the mere attorney of the court, acting under a specially delegated authority. (a) And, in no case, is a master or trustee authorized to do more than to accept an offer or proposal to contract, which is of no sort of validity unless it be accepted, ratified and confirmed by the court. It is the court itself, for the benefit of all interested, therefore, who is the vendor in such cases.

But it may be said, if the court be the vendor in sales made by its trustee, would it not follow, for the same reasons, that a court of common law must be considered as the vendor in sales made under its writ of *fiери facias* by the sheriff? The cases are essentially different. The writ of *fiери facias* is a general authority or command to the sheriff to make so much money by sale from the personal estate of the defendant. By this writ the executive officer of the court is commissioned to seize the whole, any part, or so much of the defendant's personal estate as may be necessary to raise the specified sum of money. No particular articles of property are ever designated. By statute, (b) this power, given by the common law writ over personal estate, has been extended over real estate. And the same writ, and nearly the same principles of law, now apply to both species of property.

The real or personal estate with which the Court of Chancery deals is, however, always in one form or other distinctly specified in the proceedings; and the sale is made only because the court is asked to have it made to accomplish the objects of the suit. In the proceedings at common law, from the commencement to the *fiери facias*, no property is designated. At common law, the terms and manner of sale are regulated by law; in chancery, they are regulated by the court. At common law if the sheriff, in seizing the property and making the sale, conforms to the established regulations applicable to all cases, (and he can sell in no other manner,) the sale is final and valid as soon as it is made. But in chancery the sale is, in no case, binding and conclusive, until it has been expressly approved and ratified by the court. If it be made in a manner wholly different from that prescribed by the court, it may yet be sanctioned; or, if it be made in all respects conformable to directions, it may still be rejected. And hence, it is obvious, that

(a) 1785, ch. 72, s. 7; April, 1787, ch. 30, s. 5.—(b) 5 Geo. 2, c. 7.

in the one case it is the Court of Chancery who is the real vendor, and in the other, the sheriff or executive officer of the court.

In an English case which arose on a sale under the authority of the Court of Chancery, decided in the year 1721, in which the question was, whether the purchaser should be compelled to complete his purchase or not, the matter is spoken of as one perfectly settled. 'Upon a contract betwixt party and party,' says the Chancellor, 'the contractor would not be decreed to pay an unreasonable price for an estate; so neither ought the court to be partial to itself, and to do more upon a contract *made with itself*, or carry that farther, than it would a contract betwixt party and party. On the other hand, the court might be said to have rather a greater power over a contract made with *itself*, than with any other.' (c) And in other cases of recent date, where the subject has been brought into view, the court has, in like manner, been spoken of and considered as the vendor. (d)

In a controversy relative to a trustee's sale under a decree of this court, which was frequently brought before Chancellor *Hanson*, and appears to have been much considered by him, he says, 'with respect to sales under the authority of this court, the Chancellor thinks himself bound to act as if the property were his own, or held by him in trust. That is to say, he thinks, that reasons which would induce him as proprietor or trustee to set aside a sale made by his agent, should determine him as Chancellor to refuse his approbation to a sale made by a trustee.' (e) Hence it is evident,

(c) *Savile v. Savile*, 1 P. Will. 745.—(d) *Ex parte Minor*, 11 Ves. 560; *Lord v. Lord*, 2 Cond. Cha. Rep. 253; *Shewen v. Vanderhorst*, 4 Cond. Cha. Rep. 461.

(e) *LAWSON v. THE STATE*.—This bill, filed on the 21st of February, 1800, states that the late John Semple, on the 1st of April, 1769, to secure the payment of a large debt, as specified in the exhibit, mortgaged to the plaintiff James Lawson, of Scotland, the tract of land called Semple's Manor, containing more than seventeen thousand acres; and that the defendant's estate therein was confiscated and vested in the state; but that the state never took possession, &c. Prayer for a sale, to pay debts, &c. On the answer of Luther Martin, the attorney-general, a sale was decreed accordingly.

1st December, 1803.—*HANSON, Chancellor*.—In this case a sale hath taken place under a decree, passed with consent of the parties, the Chancellor having exercised no judgment, except that he was previously satisfied there was nothing fraudulent or improper in the decree framed and agreed to as aforesaid. On the report of the trustees, that they had made a sale, and assigned reasons for the terms of the sale different from what might have been expected from the expressions in the decree, and in their advertisement. The Chancellor, as is usual in such cases, passed an order, which has been duly published according to its tenor, declaring that he would ratify the sale, unless objections should be made on or before the third Tuesday of November, 1803; provided the order be published, &c. &c.

that he considered the bidder or purchaser as a contracting party, on the one side, dealing with the court as the contracting party on

After that the Chancellor received what, 'on first sight, he supposed a private sealed letter, but under the cover, containing no letter, he found enclosed a petition with thirty-two signatures, several of which he could not read, stating, in effect, as an objection to the sale, that it was not made as expected; that the land was sold entire; that if sold in parcels it would have commanded more money; and that the signers wished and intended to become purchasers, provided the land had been laid off in parcels so as to suit them. The said petition also contained expressions highly injurious to the characters of the trustees and the purchaser; and at the same time plainly declared, that the petitioners would apply for legislative aid, unless the Chancellor would set aside the sale as *fraudulent and villanous*.

Although the petition came in so questionable a way, and was so insulting to the Chancellor, calculated as it plainly appeared, to intimidate him from the free exercise of his own judgment, and to control even his conscience; although he considered it as an attempt eventually to interrupt or defile the pure stream of justice, he sent the petition, such as it was, to the Chancery office, to be there filed, and to stand as an objection to the sale.

It has always been his practice, when an objection is made to a sale, to wait until the day appointed by his conditional order of ratification; and upon application, on or after that day, to appoint a time for hearing the objection, if any there be made. No application has been since made by any of the signers of the petition, or by any person in their behalf.

But on this day an application has been made by the trustees, on their own account, and in behalf of the purchaser; and the Chancellor thereupon proceeded to an examination of all the papers, in order that he might determine on what is proper to be done. Amongst these papers he finds several instruments of writing, by which a considerable number (about one-half) of the persons whose names are subscribed to the petition, have prayed, in effect, that they may not be considered as petitioners against the sale. Not one of the others has come forward, either in person or by a solicitor or agent, or by writing, to support the petition. On the other hand, the party most interested in the sale has filed a petition, stating that the sale has been with his perfect approbation; and most powerful reasons are assigned by him wherefore it was so approved.

But let it be considered who are the persons in contemplation, of either law or equity, interested in the sale. Not surely a person who was neither the mortgagor nor a mortgagee, nor claiming under either mortgagor or mortgagee, nor claiming under the state of Maryland. Not surely the man who conceives himself interested merely because he wished to become a purchaser, and who was disappointed because the land was not laid off in such parcels as to suit his convenience. In short, it was only a mortgagee, or the state, which was truly interested in the sale. One mortgagee, and the principal one, as aforesaid, has expressed entire approbation. No objection has been made on the part of the state, or of any other truly interested person, although notice has been duly given. And upon the whole, the Chancellor perceives no reason wherefore the sale should not be immediately ratified; protesting however, contrary to a point made by the trustee, that if a reasonable objection had appeared, he would have considered it as immaterial by whom made. Having the control of sales, he deems it his duty to avail himself of any information whatever, and never, knowingly, will he ratify a fraudulent, unfair, or unreasonable sale. He will, however, always make a distinction between volunteer objectors and ob-

the other, and who was, in fact, the vendor. That the court was to be considered as the proprietor and principal, and the trustee as

jectors who are truly interested. And what that distinction is, may appear from what he has already said.

It is *Ordered*, that the sale made by Philip Barton Key and William Marbury, as stated in their report, of a tract or body of land called Semple's Manor, be, and it is hereby declared to be absolutely ratified and confirmed.

After which, upon further and additional information, this matter was again brought before the court.

4th December, 1803.—HANSON, *Chancellor*.—The sale in this case reported hath been ratified, because no person legally interested had made any objection, and because no other person had come forward, either in person or by solicitor, to support the objections transmitted in a private letter, or to shew their validity. But the Chancellor having since received information, which would have had weight in case he had received it before, *viz.* that persons interested in the sale are dissatisfied, and the Chancellor having reason to believe that ignorance or want of notice may have prevented persons from appearing, to make or establish objections; and having always, with respect to sales, availed himself of information, in whatever way obtained:

It is, thereupon, *Ordered*, that the order for ratification passed in this cause, be, and it is hereby set aside and revoked; and that on the 15th day of February next, the Chancellor will determine finally whether or not the sale shall be absolutely ratified.

It is not on conviction or belief, that the trustees have acted improperly, that the Chancellor passes this order. It is barely that hereafter there may be no cause for alleging, that the case was not determined on its merits.

This order is directed to be served on one or both of the trustees, and published as early as may be in the *Republican Advocate*, and in the *Fredericktown Herald*, and in Grubie's German paper in Hagerstown. Unless published before the end of this month, a further time may be allowed for the decision.

This order having been served and published as required, the matter was again brought before the court.

15th February, 1804.—HANSON, *Chancellor*.—This day having been appointed to decide on objections made to the sale of the tract of land called Semple's Manor, the Chancellor proceeded to an investigation of the subject. On examination of the papers in the cause, it does not clearly appear who are the parties principally interested in the sale. The decree for the sale was passed by consent, contrary to his expressed opinion, before the claim of the complainant was ascertained; and notwithstanding the attorney-general had filed interrogatories to be answered by the complainant. He now deeply regrets that he passed the decree before all the equity was settled, notwithstanding those who appeared to be all the parties interested had assented to it. An objection, whether properly made or not the Chancellor does not determine, is put in on the part of the state; and what the interest of the state is cannot immediately be determined. On the whole, the Chancellor conceives that his decision ought to be postponed.

It is thereupon *Ordered*, that on the first Monday of May next, the Chancellor will finally decide whether or not the sale of the tract of land called Semple's Manor shall be ratified; and that depositions of competent witnesses, taken before a judge or justice, shall be received as evidence on that hearing of the cause. It is further

the mere agent, having no right or power whatever, other than as a mere attorney. Hence it is clear upon principle, and also upon

Ordered, that in the mean time, if practicable, the auditor shall state the claim of the complainant, after giving notice to the attorney-general of the time and place of stating the same.

But the Chancellor wishes it to be understood, that no order he has passed on the subject is founded on a conviction or opinion that the trustees have violated their duty. The circumstances of the case, independent of the objections against them, are such as in his opinion absolutely demand a postponement.

After which this matter was again brought before the court.

25th May, 1804.—HANSON, *Chancellor*.—The Chancellor at length proceeds to a final decision on the sale of the tract of land called ‘Keep Treiste,’ or ‘Semple’s Manor.’ Several appointments of days have been made for this purpose; and he expected that every person who considered himself entitled to any part of the land, or the money to arise from the sale, would come forward in a regular and proper manner. He is disappointed; and he is to decide, as well as he can, on such information as he has received.

He must first remark, that on the day appointed for ratification *nisi*, &c. it did not appear to him that any person whatever, who had either a legal or an equitable interest, had made an objection to the sale reported by the trustees; but it appeared to him, that the only person to be benefited by the sale had, by his agent, given it his full approbation. He did not think it becoming to postpone a ratification on account of the objections made by a letter, from persons who did not state that they had either a legal or equitable interest in the land or money, and of whom many, by writing here filed, had either disavowed or withdrawn their objections.

Under the circumstances of the case, however, it might have been advisable for him to allow a further time for making or supporting objections. The decree for the sale, as he intimated at the foot of it, was perhaps premature, although made on the written agreement of the complainant and defendant. It might be premature, because it had not then, nor has it yet, been ascertained whether any thing, or how much, was due to the complainant.

With respect to sales under the authority of this court, the Chancellor thinks himself bound to act as if the property were his own, or held by him in trust. That is to say, he thinks that reasons which would induce him, as proprietor or trustee, to set aside a sale made by his agent, should determine him as Chancellor, to refuse his approbation to a sale made by a trustee. He has always availed himself of information, by whomsoever conveyed, in deciding on the merits of the sale. Having, after he passed the order in this case for ratification, received information respecting the interest in or title to the land or money aforesaid, he considered himself at least justifiable in rescinding the order and appointing a day, of which notice was to be given, for deciding on the case.

He regrets the inconvenience which may have resulted from that order; although he insisted that, as the case presented itself to him at the time of passing the order, he could not do otherwise. He knew of no parties or persons interested except James Lawson the complainant, or the defendants, the state, who could be contemplated, either in law or equity, as interested in the sale. The former as mortgagee, and the latter was standing in the place of Semple, the patentee and mortgagor of the land. The attorney-general, representing the state, had first agreed to the sale, and he did not object to it after it had been made, and after the usual notice.

But, after the information the Chancellor has since received, he cannot hesitate to

authority, as well in this state as in England, that the Court of Chancery, and not its trustee, is in all cases to be considered as the party contracting, or as the real vendor. (*f*)

The manner of sending property into the market, as well as the mode of sale, generally adopted in this state, differs, perhaps, in some particulars, from that of other countries. (*g*) The form of ordinary sales of merchandise by auction is the same in this state as in England. But the mode of making a sale of property under the authority of the Court of Chancery in England is different.

declare his opinion, that the sale ought to be vacated. It is undoubtedly one object of each decree for a sale, to obtain the best price that can be obtained, consulting at the same time justice to all persons concerned, and attending to their wishes as far as may be consistently with justice. The Chancellor, as has been already intimated, passed the order for confirmation, merely because it appeared to be the wish of the only party entitled to receive the net money arising from the sale. The circumstances since disclosed to him, make the case appear very different.

It seems that there are concerned several persons who have not given their approbation, and it is doubtful whether the complainant is entitled to receive any part of the money aforesaid. It is certain, that when Semple's Manor was sold entire, a sale in that manner had not been announced before the day of sale. It is most probable, that the trustees had not before that day contemplated such a sale, and were determined by circumstances that then took place. But if they then discovered that a sale in parcels, agreeably to their advertisement, was impracticable, or would not be advantageous to the persons who were to receive the money, it would have at least been prudent for them to advertise, or give notice of a future day, when they would sell the whole together, or divided into large parcels laid off by the surveyor. It cannot be supposed, that any person went to the place of sale with an expectation of having the whole body of land set up. The Chancellor, however, thinks it his duty, in mere justice to the trustees, to declare, that in his opinion there is no ground for concluding that they were guilty of fraud, corruption, or undue combination, in making the sale. He believes from a careful examination of all the proofs, that they acted according to their judgment as faithful trustees; but he cannot for a moment doubt, that their judgment was erroneous, even if the land hereafter should not command a higher price than they sold it for.

It is accordingly *Ordered*, that the sale made by Philip Barton Key and William Marbury, of the aforesaid tract or body of land called 'Keep Trieste,' or 'Semple's Manor,' be, and it is hereby declared to be set aside, vacated, and annulled.

The Chancellor, for the present, declines to pass any decree or order relative to another sale of the land; but he is anxious to make, without delay, such arrangements as may do complete justice to every party concerned. Let the counsel, if they think proper, agree upon another sale, to be prescribed by a decree. He conceives that, notwithstanding the statement of the report, the land may conveniently be laid off in parcels from one hundred to one thousand acres; and that payment may be as directed by the original decree. That the land, if the legal title thereto be vested in the state, ought to be sold, he thinks unquestionable. But, strange it is, that persons having a claim superior to Lawson's, should not come forward in a regular proper manner. Should it appear that any person, not a party to the suit, has a legal title to the land itself, assuredly it ought not to be sold.—*M. S.*

(*f*) Gibson's Case, 1 Bland, 138.—(*g*) Sugd. Vend. & Pur. 18, n.

In such case, the estate is sold before one of the masters in chancery, who, after the particulars of sale are prepared, corrects and sanctions it by his signature, to authorize the insertion of the advertisement in the Gazette. After which the master, with the approbation of the parties, fixes a time of sale; and the second advertisement, for there are always two, is then inserted in the Gazette, stating the time of sale. On the day of sale a particular of the property, or lots to be sold, is prepared under the authority of the master. The property or lots successively are put up at a price offered by a person present, and every bidder must sign his name, and the sum he offers, in the space on the particular under the lot for which he bids. The best bidder is, of course, declared to be the purchaser; the biddings are closed, and he is reported as such by the master, to the court; and if the sale be ratified, the contract is complete. (*h*)

In this state the manner and terms of sale are particularly prescribed in the decree; and the trustee is directed to conform thereto. The sale may be directed to be either private or public. If the latter, it is conducted in the form of an ordinary auction; the bids are received verbally, and the highest bidder is reported as the purchaser by the trustee.

All the several forms of sale are, however, mere modal regulations; each of them has its advantages and inconveniences; but none of them can, in any way, materially affect the parties to the contract, or its terms, nature, or obligatory force. The English Court of Chancery will not suffer the property to be sold in any manner different from that prescribed. (*i*) In this state these modal regulations are not regarded as of so much importance; and are therefore not so strictly adhered to. If a trustee, who is directed by the decree to sell the tract of land entire, and at public sale, should sell it at private sale and in parcels, or in any other manner different from the mode prescribed, and report satisfactory reasons for doing so, and no objection is made, the sale may be ratified.

But whatever variety or difference may exist as to the mere modality of sale, the intentions and general objects are the same every where and in all cases. The benefit of the interested parties, for whom the court makes the sale, is always and chiefly regarded. The highest price that can be had, under all circum-

(*h*) Sugd. Vend. & Pur. 37; 1 Newl. Pra. Cha. 334; 2 Fowl. Exch. Pra. 255.—

(*i*) Annesley v. Ashhurst, 3 P. Will. 282.

stances, should be obtained ; and the sale should be in all respects a fair and honest one. These are the ends in view. To attain them, in England, if after the biddings are closed, any one else comes in and offers a much higher price, the biddings may be opened, and the additional offer accepted. This phrase of 'opening the biddings,' which, in the English books, occurs so frequently, means no more than a further suspension of the sale, and a continuance of the property in the market. (*j*) In this state, there has been no instance of opening the biddings or suspending the sale merely to let in another and a higher bid, and for no other cause. But in this state, as well as in England, if there should be made to appear, either before or after the sale has been ratified, any injurious mistake, misrepresentation or fraud, the biddings may be opened, the reported sale rejected, or the order of ratification rescinded, and the property again sent into the market and re-sold.

As to sales under the authority of this court, it has long been well established, that any circumstance shewing that the sale was injurious to the parties concerned, or that a better sale might reasonably and probably have been made, is sufficient to prevent a ratification. It is not incumbent on the party objecting to shew favouritism, or an improper motive, although such proof would furnish conclusive inducement for rejecting the proposed sale. But where the property of infants was to be sold, even a strong doubt of the propriety of the sale has been deemed sufficient to prevent its ratification. And if, in any case, the trustee reports, that there was an error, mistake, misunderstanding, or misrepresentation as to the terms or manner of the sale, it may be at once rejected, and a re-sale ordered without further inquiry. Objections are seldom or ever made by any others than those directly interested. But the court, in acting as proprietor, or as if the property were its own, and in deciding on the merits of a sale, will avail itself of information from every quarter from which it may be derived ; that is, from the original parties to the suit, or the creditors for whose satisfaction the sale is to be made, or from any other person. In such cases, however, much more attention will be paid to objections coming from those who are interested than from volunteers. But it is not unusual, with the consent of all parties interested, to ratify the sale immediately on its being reported, without giving any notice or time for objections to be made by others.

Where land has been sold, under the authority of this court, by the tract or in parcels, containing so many acres, 'more or less,' the sale will not be rejected, unless the deficiency, should it be objected to on that account, be material and considerable. It has been established as the law of the land office, by the proprietary's instructions, as far back as the year 1684, that the words 'more or less,' in every patent grant, shall be taken to amount to ten *per cent.* over or under, and no more. (*k*) But in this court, and in relation to private contracts, or to sales under a decree, the words 'more or less,' added to the statement of the quantity, has never yet been fixed by any decision. (*l*) Each case appears to have been governed by its own peculiar circumstances. Where the deficiency was material in that part which was the inducement to the purchase, or the like, the sale has been set aside. (*m*) But where the deficiency has been such as not materially to vary the contract, and the purchaser was still willing to purchase, a proportionable deduction has been made. But where land is sold, not by the tract or in a body, but by the acre, or in lots, at so much per acre; and the alleged number of acres, or the location and description of the lots should not be known or admitted, a survey, when called for, may be ordered as of course; by which all uncertainty as to the quantity and location of the land, and the amount of the purchase money may be entirely removed. (*n*)

(*k*) Land. Hol. Ass. 253.—(*l*) *Brown v. Wallace*, ante 586.—(*m*) *Stapylton v. Scott*, 13 Ves. 425.

(*n*) *CHRISTIE v. HAMMOND*.—This was a creditor's bill, filed by James Christie and others against George A. Hammond and others, the devisees and executrix of William Andrews, deceased. The defendants answered, and admitted the claims of the plaintiffs and the deficiency of the personal estate.

20th June, 1791.—HANSON, *Chancellor*.—*Decreed*, that the real estate be sold, that William McLaughlin be the trustee to make the sale, &c. 'And that when the said sale shall have been approved, ratified, and confirmed by this court, and the purchase money shall have been paid to the said trustee or his successor, or the bonds shall have been assigned under the directions of this court, the said trustee, or his successor shall, as trustee, convey,' &c.

After which other creditors came in, and filed the vouchers of their claims.

25th May, 1795.—HANSON, *Chancellor*.—The Chancellor having examined the claim of James Christie, founded on five bonds for £100 each, and costs of suit and interest from the date 15th of March, 1775, to the 30th of April, 1793, excluding the time from the 4th of July, 1776, to the 3d of September, 1783, that being the duration of the war between the United States and Great Britain, to whom the complainant is a subject, and the said claim amounting to £839 14s. 3d. It is adjudged and *Ordered*, that on the application of the said Christie, or his attorney in fact, assignee, or other legal representative, the trustee, R. B. Latimer, assign and de-

In England, it would seem to be usual, in sales under the authority of the court, to offer a good title to the bidders; and hence the references to a master, at the instance of a party or of purchaser, of which we read so often, to ascertain whether a good title can be made or not. (o) But in this state it has been always the established law of the court, to sell all the right and title of the parties to the suit, whatever that may be, and nothing more. To all judicial sales under orders or decrees of this court, the rule *caveat emptor* has been applied. And consequently no examination into the title, after the sale, is necessary, or can be called for

liver in or towards the discharge of the said claim, any bond or bonds taken on the sale of the said Andrews' real estate, unless from obligors who are also claimants, on which interest is chargeable from 30th of April, 1793, and of which the principal doth not exceed the sum of £839 14s. 3d.

After which the case was brought before the court for further directions, in regard to the sales made by the trustee.

14th March, 1797.—HANSON, *Chancellor*.—The location and quantity of the lots of land sold by the trustee to Isaac Van Bibber appearing to be uncertain, the surveyor is *Ordered* to survey and return plots, &c.

The surveyor having made return of a plot and certificate, as directed by this order, the matter was again brought before the court.

24th January, 1799.—HANSON, *Chancellor*.—John Bouldin, surveyor, having made out and returned a certificate and plot of numbers 1, 2, and 3, of the land of the said William Andrews, sold to Isaac Van Bibber by William McLaughlin, former trustee; and the present trustee, Randolph B. Latimer, and the said Isaac Van Bibber, having, by writing in this court filed, agreed that the certificate and plot aforesaid contain the true location of the said lots numbers 1, 2, and 3; it is thereupon adjudged and *Ordered*, that the lands sold by the said McLaughlin to the said Van Bibber, are accurately described by the said certificate, except as herein after mentioned; that the said sale be hereby absolutely ratified and confirmed; and that the said trustee, Randolph B. Latimer, provided the purchase money of the said lots hath already been paid, or on payment of the said purchase money, shall, in the manner directed by the original decree in this cause, convey unto the said Isaac Van Bibber and his heirs the aforesaid three lots of land, according to the description in the said certificate, except that the deed of conveyance shall describe the twenty-third line of the third lot as running south nine degrees and one-half west, instead of nineteen degrees and one-half west; the examiner-general having examined the plot and certificate, and having suggested the correction.

And inasmuch as the said three lots do not contain so much land as they were sold for by the said McLaughlin, it is further *Ordered*, that the said Van Bibber shall have an allowance for the deficiency, viz. for 28 acres, 2 roods, and 20 perches in lot number 1; for 2 roods in lot number 2; and for 1 rood in lot number 3; amounting in the whole to 29 acres, 1 rood, and 30 perches.

Ordered, further, that the said trustee, out of the money arising from the sale of the real estate of the said William Andrews, do pay the expense of the survey and delineation of the said lots, amounting to the sum of sixteen pounds ten shillings.

(o) Brown v. Wallace, ante 586.

by the purchaser, whatever may be either its patent or latent defects. (*p*) But if the trustee makes any promise or representation to the bidder, before the sale, that the estate shall be, or is clear of all incumbrances, or that the title is better or different from that to be traced from the proceedings, and any such claims should afterwards appear, or be set up, the sale will be annulled. But this relief would be granted to the purchaser on the ground of misrepresentation or fraud, and not on that of a mere defect of title, as in cases between party and party.

After a sale has been ratified, the court, in England, will not rescind the order, and open the biddings without strong inducements. (*q*) So in this state, after a sale has been made and reported, and before it has been ratified, it is open to all objections. And, if objected to, unless it should, on examination, turn out to be, in all respects, fair and proper, it will not be ratified. But, after it has been confirmed, the purchaser can only obtain relief by bill or petition; and thus calling the litigating parties to the suit again before the court to answer, repel, and remove the objections which he may so make, if they can.

(*p*) *GOODWIN v. SCOTT*.—The complainants were purchasers under a decree of the defendants, who were the trustees. A suit at law had been brought against them by the trustees for the purchase money; and they now brought this bill, having discovered, as they alleged, that the land was deficient in quantity, and that the trustees could make no title, because there were other incumbrances not made known at the time of sale.

September, 1806.—*KILTY, Chancellor*.—The right and title of the parties to the original suit, whatever it might be, was to be sold; and no person, whether part buyer or part seller, was bound to examine into the title of the estate, which was in *custodia legis*, and vested in the trustees, who were not competent to make the objection of any latent or obvious defect. In this state it has been repeatedly declared that, in sales under a decree of this court, which are made subject to the Chancellor's approbation and ratification, any circumstances shewing that such sales are injurious to the complainants, or that better sales might reasonably and probably have been made, are sufficient to set them aside. This principle to be just, should be reciprocal and mutual. And the ratification that has been given, can make no difference as to the present claim. Under all the circumstances, the Chancellor vacated the sale for one of the lots, and made the injunction to stay the proceedings at law in part perpetual. And the lot, the sale of which was thus annulled, was ordered to be again sold entire, and not by the acre. It was objected, that inasmuch as a survey was made of the lands and a plot exhibited, the smallest variation would destroy the contract. The true location, however, is not so much the point in dispute as the substantial value of the land, and if that is not altered the difference forms no ground of relief. Different surveyors have made it different in quantity, and if the purchaser has an allowance for the deficiency, it is all he can require.

It is usual, in England, at the time of bidding, or of having the biddings opened to be let in as a higher bidder, for the proffering purchaser to make a deposit of a considerable amount of the purchase money, by way of earnest. And this deposit is sometimes said to be the only hold which the court has upon the purchaser; and it is in truth, the only hold which it can have of him in that stage of the proceedings; for he cannot be quickened before the report is confirmed absolutely. (r) And should he turn out to be insolvent, it is the only effectual hold the court will ever be able to take of him. Consequently, the exacting of a deposit from the purchaser is there considered as a useful and proper precaution. (s) If the purchaser refuses to comply with his contract, the court will, if required by a party interested, inquire whether he is able to pay; and if it should appear that he is insolvent, or has not the means of complying with his contract, the sale will be annulled, the deposit forfeited, and a re-sale ordered. For, even at common law, and between party and party, if, after being requested, the vendee does not, within a convenient time, come and pay for, and take away the goods purchased, the agreement will be dissolved, and the vendor at liberty to sell them again to any other person. (t) If, however, the purchaser is able, and fails to comply, the court will not suffer itself to be baffled, but will, at the instance of a party interested, compel the purchaser to comply by process of attachment for contempt.

The exercise of a similar summary power of coercion by this court against a tardy or unwilling purchaser, after the confirmation of the sale, it has been repeatedly and strongly urged, is one which is not within the scope of its jurisdiction. The exercise of such an authority, it has been urged, is a very recent and equivocal extension of the power of the Court of Chancery in England. It has sometimes happened that a necessary and important power, after having been called into action, and produced all the beneficial effects required or expected, is suffered to slumber so long as to drop almost into oblivion. Such, it would seem, has been, in some degree, the fate, both in England and in this state, of this power of coercing a purchaser under a decree, to comply with his purchase.

In the year 1721 the Court of Chancery of England was pressed

(r) Anonymous, 2 Ves. jun. 336.—(s) Anonymous, 6 Ves. 513.—(t) Langfort v. Tiler, 1 Salk. 113.

by a party interested to force a purchaser under a decree to complete his purchase, and not to let him off by a mere forfeiture of his deposit, although it amounted to nearly one-tenth part of the purchase money. It was not even intimated that the court had not the power to do so. But it would seem that, in that case, the purchase was made at a time when the nation was under a general delusion as to the quantity of money in circulation, and the value of property, and the purchaser had been thus induced to give an unreasonably high price for the property in question. The Chancellor, without expressing the least doubt as to his power to use coercion in a summary way against the purchaser, or saying any thing distinctly upon the point, said that it was punishment enough if the purchaser was made to lose his deposit, and satisfaction enough to the seller if he was to have the benefit of keeping it. (u) Hence it may be inferred that the court considered itself as having the power to proceed against the purchaser, but that it did not think proper to do so in that case.

One of the most accurate of the English reporters, gives us the following, as the words of *Lord Hardwicke*, delivered in the year 1748, in relation to this subject: 'the present,' says he, 'is a judicial sale of the estate, which takes it entirely out of the statute, (of frauds.) The order of the court was not interlocutory, but made part of the decree; as it always is on the matter reserved, though made at another day; and it includes as well the carrying the purchase into execution, as the establishment of the charity; amounting to a decree for the conveyance of the estate on one side, and payment of the money on the other; who might be prosecuted for a contempt in not obeying that order. And it is stronger than the common case of purchasers before the master, who are certainly out of the statute; nor should I doubt the carrying into execution against the representative, a purchase by a bidder before the master, without subscribing, after confirmation of the master's report, that he was the best purchaser; the judgment of the court taking it out of the statute. But even in common cases, this question may arise; as if the authority of an agent, who subscribed for the bidder, not being admitted, cannot be proved. Yet, if the master's report could be confirmed, it should be carried into execution, unless some fraud; for this is all exclusive of any defence that may still be set up on the other side.' (w)

(u) *Savile v. Savile*, 1 P. Will. 745.—(w) *Attorney-General v. Day*, 1 Ves. 218.

In this case, the testator had bequeathed a certain sum of money to be invested for charitable purposes, and on a reference to the master to propose a scheme of investment, he had reported, that the money should be laid out in the purchase of certain lands. The report had been confirmed, and the object then was, to obtain a specific performance of the order confirming the master's report. As to which point, *Lord Hardwicke* is reported to have said, 'the material consideration is, whether, as circumstances now stand, considering the events and alteration of rights thereby, the court ought to carry it into execution? The general rule certainly is, that this is discretionary in the court, but will not hold in the present; for that is generally in cases, where there may be an election of two remedies, by coming here for a specific performance, or by action at law; whereas, here, there can be no remedy at law; all arising under the acts of this court, from that order amounting to a decree. So, that if this court does not carry it into execution, it cannot be at all; yet, whether other remedy or not, if there are strong and material objections against it, the court ought not to do it.'

Hence, it appears to have been the decided opinion of *Lord Hardwicke*, long before our revolution, not only that a purchaser, after the sale had been ratified, might be compelled to pay the purchase money by process of attachment for contempt; but that there was, in fact, no other remedy; since it is clear, that no action at common law, could be maintained against the purchaser, grounded merely on the order in chancery confirming the sale. And this was cited by *Lord Eldon*, in 1805, with approbation, as being entirely sound in its principles. (x)

A doubt was expressed upon this subject, in a case on the equity side of the Court of Exchequer, in the year 1793, when, on the court's being referred to a similar proceeding in chancery, which had taken place in the year 1787, an order was made, after the confirmation of the sale, that the purchaser should be compelled to complete his purchase. (y) But in the year 1808, the instances in which the Court of Chancery had exercised such a power, seems to have been again almost forgotten. (z) The Chancellor expressed

(x) *Ex parte Minor*, 11 Ves. 562; *Casamajor v. Strode*, 1 Cond. Cha. Rep. 195; *Bligh v. Darnley*, 2 P. Will, 620; *Carpenter v. Thornton*, 5 Com. Law Rep. 225.—

(y) *Cunningham v. Williams*, 2 Anstr. 344; S. C. 2 Fowl. Exch. Pra. 268, 272.—

(z) Anonymous, 2 Ves. jun. 336.

some doubt, but on being referred to a case which arose in the year 1791, he made the order, that the purchaser should pay his purchase money within a fortnight, or stand committed; observing, that the principle required it equally in the case of a purchaser, who could not be permitted to baffle the court, and disobey an order, more than any other person. (a)

From these authorities it appears to have been the settled law of the English Court of Chancery long before, and ever since our revolution, that on a purchaser's failing to comply, the court would, on application, after the ratification of the sale, compel him to complete his purchase by process of attachment for contempt.

But it has happened in this state as in England, that the evidence of the existence of this power, so important and so necessary to the jurisdiction of the Court of Chancery, has been many times almost forgotten, and the propriety of the power itself has been as often doubted or opposed. (b) There is no instance in this state of a deposit ever having been exacted of a bidder, before the ratification of the sale; and therefore, if a purchaser cannot be coerced by process of attachment, this court has no hold of him; nor can it ever take hold of him, in any manner, so as to prevent him from making a mere sport of its decrees.

Some five and twenty years ago, it happened, that a purchaser under a decree of this court, became a bankrupt; and the solicitor, under an impression that relief could only be had by a regular suit, brought a bill, in which it is stated, that the land had been sold on a credit, and bonds taken of the purchaser, with a surety, to secure the purchase money; that the bonds were, by order of this court, assigned by the trustee to the complainant; that the purchaser had been regularly declared a bankrupt; and that the surety was insolvent. The purchaser and his assignees only, were made defendants. The bill prayed, that the sale might be annulled, that the bonds might be cancelled, and for general relief. The assignee answered and admitted the fact, and the bill was taken *pro confesso* against the purchaser. Upon which, the Chancellor, in his decree of the 7th of July, 1808, concisely observes, that 'although the complainant might obtain relief in another way, and the neglect or refusal to pay money due for property sold, is not alone, a sufficient

(a) *Lansdown v. Elderton*, 14 Ves. 512; *Ex parte Cranmer*, 2 Collinson on Idiots, 705.—(b) It is true, that the law sometimes sleeps, and judgment awakens it; for, *dormit aliquando lex moritur nunquam*.—*Mary Portington's case*, 10 Co. 42.

ground to set aside a sale ;' yet, considering the circumstances of that case, the sale was annulled, and the bonds cancelled as prayed. (c) In this respect, there are but two modes of proceeding in chancery, the regular and the summary way. The other way of which the Chancellor speaks, in this regular case by bill, must, therefore, be understood to mean the summary way by petition, for process of attachment against the purchaser, or for a resale, grounded on the equitable lien ; which latter, must have been that other way, particularly alluded to. For, he certainly could not have referred to an action at common law, on the bond against this bankrupt purchaser, and his insolvent surety.

In the year 1821, a case occurred in this court, in which the party interested, applied for, and actually obtained relief, in that other way, alluded to, as it is believed, by the Chancellor, in his decree of 1808. After the ratification of the sale, the purchaser had neglected and refused to pay the purchase money. Upon a petition of the trustee, representing the fact, the court passed an order commanding the purchaser to pay by an appointed day, or shew cause, or on default, an attachment would be ordered. The party made default, and an attachment was ordered. After which, the money was paid. (d)

The defence of this purchaser, in this case, is that the parties can only obtain redress by bill in equity or a suit at law. He has already, by petition, prayed relief of this court ; and after having obtained its decision in that form, and had that decision submitted to the revision of the court in the last resort, it surely ought not to be expected, that these tribunals would again consider and adjudicate upon that cause of controversy, if presented in a new shape, and merely put into the form of a suit by bill. The jurisdiction of this court over this matter was as extensively and beneficially exercised, on its being presented by petition, as it could have been in any other way ; and the mode by petition is certainly the most usual and proper, if not the only one in which it ought to have been presented. Every objection which this purchaser chose to make ; and, no doubt, every one which he thought could be made, with any degree of plausibility, against the ratification of this sale, has been made, fully and maturely investigated, considered and decided upon here ; and that judgment has been affirmed by the

(c) *Simpson v. Hammond*, per *Kilty*, Chancellor.—(d) *Bolte v. Biays*, 15th March, 1821, per *Kilty*, Chancellor.

Court of Appeals. The contract between this court and this purchaser is, therefore, now absolute, complete, and of record.

But now, in answer to an order calling on him to pay the purchase money, he says, that relief, or the means of forcing him to pay can only be obtained by bill in equity, or a suit at law. A bill in equity in this court would only be going over the same ground, that has already been gone over. It would be idle repetition, an unnecessary and improper proceeding; and, therefore, cannot be allowed. This purchaser stands charged by the record and proceedings, now here, as the debtor of this court, for the benefit of its suitors, to a certain amount upon a judicial sale and contract, which has been duly investigated, and absolutely ratified and confirmed.

It is said, however, that a suit at law must be brought upon this contract. By whom must it be brought? Was a suit at law, grounded merely upon an order in chancery, ratifying a sale made under a decree, ever before heard of? *Lord Hardwicke*, as we have seen, has expressly declared, that there can be no remedy at law where all the contract arises out of the acts of the court amounting to a decree. But this court is to be regarded as the vendor; and as no bond or note has been taken from this purchaser, which could enable the parties interested to put their claim against him into the common law form of an action at law, how, or in what manner, is such an action to be brought? Must they bring an action of debt, of assumpsit, or a special action on the case?

In all cases of this sort, where property has been sold under a decree to pay debts, or for other purposes, and no bonds or notes have been taken, there seems to be an insuperable difficulty in making proper parties to try the right at law to the whole purchase money, or to any dividend of it, either as against the purchaser, or any one or more of the litigating parties to the suit in equity. The powers of the trustee, if he takes no bonds or notes, cease with the ratification of the sale, as to all the purposes of a suit at law. The decree clothes him with no power to sue at law; and if it did, or this court were specially to direct him to sue, it must put into his hands the cause of action, the evidence of the debt, with its own order. The action must then be grounded upon an order of this court, and instituted in the name of its agent. It would be as if one court were to bring suit upon its own judg-

ment in another court. Could such an action be sustained? I conceive it could not.

Chancellor *Hanson*, in an order of the 2d of May, 1803, in speaking of a contract between suing creditors about a dividend of the proceeds of their deceased debtor's estate, says, 'he had never thought it necessary in case of any disputed claim to send out an issue, or to refer the party to an action at law. Indeed, it would be difficult, in most cases, to ascertain the proper parties for an issue. The executor or administrator surely would not be compelled, without being a party, to act as defendant on the trial of the issue. However, in all cases where a claim depends on a single fact or facts strongly litigated, and of difficult investigation, the Chancellor conceives, that in some manner an issue ought to be tried.' (e) The Chancellor may control the parties to the suit in equity, so as to compel them to submit to the trial of an issue at law in any form he may dictate. But, if a purchaser cannot be proceeded against here, he certainly cannot be controlled at law. (f) Upon the whole it is clear, that there can be no remedy against a purchaser at law independently of his bonds.

It seems to be an opinion of some, that there was a distinction between sales for ready money, and sales on credit, where bonds or notes were given for the purchase money. But, as regards the purchaser, it is difficult to conceive how his liability, and the nature of his obligation can be substantially varied by the single circumstance of the purchase money having been made payable on the day of the ratification of the sale, or one day, or one month, or one year after that day. (g)

When the term of the credit has expired, and the purchase money is actually due and demandable, it would seem necessarily to follow, that the payment might be enforced, as in all other cases, by any form of legal or equitable proceeding, by which, compliance with such a contract, might be enforced. And, that if the process of attachment might have been used to enforce a compliance, if payment had been stipulated to be made on the day of the ratification, it certainly might be used for the same purpose, at any time after, when the money became due; because such a mode of proceeding grows out of, and is incident to the nature of the contract between the court and the purchaser, and cannot be af-

(e) *Ringgold v. Jones*, 1 Bland, 89, note.—(f) 2 Mad. Chan. 474; 1 Newl. Chan. Pra. 350.—(g) *Ex parte Cranmer*, 2 Collinson on Idiots, 705.

fect by any stipulation as to the mere time of payment. It is a mode of proceeding, necessarily incident to such a contract; because every particular of it, is a matter of record; and that too, in a court peculiarly fitted and competent to relieve against any accident, mistake or fraud that has happened, or may be discovered. Such a contract is not within the statute of frauds; and there is nothing left open for litigation or trial before another tribunal, or even before this court, which cannot be fully and satisfactorily inquired into and determined in the most summary way. The form and nature of the contract, precludes controversy, and supersedes all trial. There is, however, one, and but one question arising out of it left open, and that is, whether or not the money has been paid as stipulated?

But when a sale has been made on a credit, and bonds have been taken to secure the purchase money, it has long been the established practice, after the day of payment has elapsed, to sue upon the bonds; which shews, as it is said, that they alone are looked to, and that all other modes of proceeding have been tacitly waived. But the bonds in such cases, are intended only as an additional assurance. And it would be contrary to all the analogies of the law, to construe the taking of one security, into an abandonment of another, where there was no incompatibility in the existence of both.

Thus it has been held, that although the statute requires the party who sues out a commission of bankruptcy, to give bond with surety, to answer to the party who may be injured thereby, does not deprive the party injured, of any remedy at common law, other than upon the bond. He can, it is certain, have no more than one satisfaction for the injury, but to obtain that, he may sue either at common law on the special circumstances, or upon the bond. (*h*) So, the importer of merchandise becomes thereby, a debtor to the government for the amount of the duties imposed by the act of congress. But the law indulges the importer with a credit, on his giving bond for the duties; yet the giving or not giving of a bond, does not supersede the right of action which accrues to the government by operation of law on the importation. The government may sue the importer on such legal liability, considering him as its debtor, or it may sue upon the bond, if one has been given.

(*h*) *Brown v. Chapman*, 3 Burr. 1418; *Ex parte Gayter*, 1 Atk. 144; *Holmes v. Wainwright*, 1 Swan. 23.

They are considered as two assurances, each affording a remedy, or mode of obtaining one satisfaction. (*i*) So also, a receiver appointed by the Court of Chancery, is always required to give bond, with surety, to account. But in such case, the court may either proceed by attachment against the receiver alone, or upon the bond. (*j*)

In all these, and other like cases, the existence of the two securities, being perfectly compatible, the one with the other, it has never been held, that the taking of one amounts to a tacit waiver of the other. (*k*) And consequently, the taking of bonds or notes with or without surety, of a purchaser under a decree, cannot, in any case, be construed as an abandonment of the right to proceed against the purchaser alone by attachment, to enforce the payment of the purchase money, after it has become due, and after the sale has been ratified.

But if the parties choose, as they may, to have the bonds or notes which have been taken of the purchaser, assigned to them in satisfaction of their claims, that have been established; (*l*) or to have the trustee directed to proceed against the purchaser and his sureties, in order to fix their liability by a judgment at law, and in that way to recover the purchase money, suits may be brought upon the bonds or notes by the assignee or the trustee, according to the uniform and long established course, where such has been the choice and object of the parties. (*m*)

It is a clear and well settled principle of this court, that where property has been sold under its decree, the court, as the vendor for the benefit of those interested, retains an equitable lien for the payment of the purchase money. (*n*) The most usual way of enforcing this lien, has been by petition of a party interested, setting forth the facts, and praying that the property may be re-sold to pay the whole or the balance of the purchase money. And a sale may be ordered accordingly, at the risk of the delinquent purchaser. The proceedings, in such cases, are almost always infor-

(*i*) *The United States v. Lyman*, 1 Mason, 482.—(*j*) *Davies v. Cracraft*, 14 Ves. 143; *Musgrave v. Medex*, 1 Meriv. 49; *Utten v. Utten*, 1 Meriv. 51.—(*k*) *Wright v. Freeman*, 5 H. & J. 475; *The Mayor of Baltimore v. Howard*, 6 H. & J. 394.—(*l*) *Spurrier v. Spurrier*, 1 Bland, 476, note; *Ex parte Boone*, ante 321, note; *McMullen v. Burris*, ante 357, note; *Christie v. Hammond*, ante 645, note; 1785, ch. 72, s. 9.—(*m*) *Collinridge v. Mount*, 2 Dick. 688; *Musgrave v. Medex*, 1 Meriv. 49.—(*n*) *Mackreth v. Symmons*, 15 Ves. 329; *Cowell v. Simpson*, 16 Ves. 276.

mal and summary. (o) The vendor under a decree, therefore, holds two securities for the payment of the purchase money; one is this equitable lien, and the other is the personal liability of the purchaser. It is conceded on all hands, that the equitable lien may be enforced in a summary way. Can there then, be any conceivable solid reason, why the personal liability should not also be enforced in a summary way? If it could not, there would be a gross incongruity in the rules of the court. But it is not so; the personal liability may be enforced in a summary way, and there is a perfect harmony in the rules and principles of the court.

Upon the whole, it is my opinion, that the purchase money of property sold under a decree, after the sale has been ratified, may be recovered either by an order and process of attachment of contempt against the purchaser himself, to compel him to complete his purchase after the purchase money has become due; or by a re-sale of the property, grounded on the subsisting equitable lien; or by an action at law against the purchaser and his sureties, upon the bonds or notes given by them for the payment of the purchase money.

Ordered, that no good cause having been shewn against the order of the 17th of March last, the same is hereby confirmed and made absolute. Also *Ordered*, that an attachment issue against the said *Samuel Anderson*, to enforce obedience to the said order, returnable to the next term.

From this order *Anderson* having appealed, a transcript of the record was sent up accordingly, and the case was argued before the Court of Appeals by the solicitors of the parties. (p)

June term, 1828.—By the Court of Appeals.—It appears from the proceedings in this case, that on the sale made by the appellee to the appellant, being reported to the Chancellor, objections to its ratification were filed by the appellant, and answered by the appellee, on full consideration of which, the sale was ratified, and that ratification affirmed by this court; it is, therefore, not competent for the appellant now to contest the propriety or validity of that sale, it having received the sanction of the highest judicial authority of this state. But it has been contended, that as the appellant never was

(o) *Haig v. Commissioners of Confiscated Estates*, 1 Desau. 144.—(p) This opinion of the Court of Appeals is introduced here, out of chronological order, that it may be placed in juxta-position to the decision of the Chancellor, to which it relates.

reported to the court as the purchaser of the property sold by the appellee, he cannot be compelled to complete the purchase by paying the purchase money. It does not appear, it is true, that the trustee in this case, has proceeded according to the usual practice of the court, in making a formal report of his sale; but it appears by the proceedings, that on the 9th of October, 1822, the appellant filed his petition to the Chancellor, in which he stated, that he had contracted with the appellee for the purchase of the land in question, supposed to contain one hundred and forty acres, at, and for the sum of \$11 per acre, and by the report of the trustee, (the appellee,) was returned the purchaser, and prayed that the sale made and reported, might not be confirmed. On the coming in of the answer of the appellee, and the return of depositions, which were taken in pursuance of the Chancellor's order, and upon the return of the locations made by the sheriff of the county, under the same authority, the Chancellor passed an order ratifying and confirming the sale, which order, on appeal, received the sanction of this court.

It is, therefore, now too late for the appellant to object that he was not reported, in the more formal and usual way, to the Court of Chancery, as the purchaser of the property. The trustee, moreover, in answering the petition of the appellant, against the ratification of the sale, refers to, and makes a part of his answer, the written contract of sale to the appellant, executed by both the appellant and appellee, which mentions fully, the terms of sale, and which is understood to be the sale ratified by the Chancellor. Under this view of the subject, this court are of opinion that there is nothing in the objection that the appellant was not reported to the court as the purchaser of the property, and that a good title cannot be conveyed to him in consequence of this irregularity in the proceedings.

It has been contended that the Court of Chancery has no power, by a summary proceeding, to compel a purchaser at a trustee's sale, made under the authority of its decree, to complete his purchase by enforcing the payment of the purchase money. This objection, it is conceived, cannot be available in the case now under consideration. The trustee did not take either notes or bonds for the payment of the purchase money, upon which a suit or suits at law could have been instituted, but relied solely upon the liability of the purchaser arising from the contract of sale, which was not binding upon either party until ratified by the

Chancellor ; but when ratified, it was his duty to pay the purchase money, or shew good cause to the contrary. Neither of which has he done in the present case ; for neither the allegation of the trustee's inability to comply with the terms of the sale, nor that the property, being in the possession of a third person, the trustee was unable to deliver him possession, is supported by a shadow of proof.

Had the Chancellor, therefore, under the circumstances of this case, a right to adopt the proceeding to which he resorted to compel the payment of the purchase money ? We think he had. The order of the Chancellor was, that *Samuel Anderson*, the purchaser, should pay the money to the trustee, or bring the same into court on a particular day, or shew good cause to the contrary. Under the terms of this order, it is not perceived why *Anderson* could not have made as full a defence, and have availed himself of all the objections, which could have been relied upon, in case an original bill had been filed against him to enforce the same object. Upon application to the Chancellor, setting forth that testimony would be essential to his defence, on the hearing of the order, the Chancellor would have passed an order to enable him to obtain it, upon the return of which a full hearing of the merits of the case might have been had ; and if equity and justice required it, he would and ought to have been discharged from his purchase. That the Court of Chancery in England has the power of compelling a purchaser to pay his purchase money after the confirmation of the sale, by an order for that purpose, is not to be doubted. *Lansdowne v. Elderton*, 14 Ves. 512 ; *Newland Ch. Pr.* 336. In *Brasher's Exrs. v. Cortlandt*, 2 Johns. Ch. Rep. 506-7, it appears, that by the practice of the Court of Chancery, in New York, a purchaser may be compelled to complete his purchase ; and Chancellor *Kent* is reported to have said, 'I have no doubt the court may, in its discretion, do it in every case, where the previous conditions of the sale, have not given the purchaser an alternative.'

In this case it is quite apparent that procrastination and delay are the objects of the purchaser, as he has taken every measure in his power to prevent the ratification of the sale ; and after the sale was ratified, on appeal to this court, has still refused to pay the purchase money, and has driven the trustee to resort to the compulsory power of the Court of Chancery to coerce payment. Under these circumstances, we think it a fit case for the exercise of such a power by that court ; although it is not intended

at present to establish any general rule on the subject. There is nothing in the objection that the quantity of land sold has not been sufficiently ascertained. Order affirmed.

The plaintiffs by their petition stated, that the trustee *Foulke* had died, and thereupon prayed that some other person might be appointed in his stead.

1st March, 1827.—BLAND, Chancellor.—The plaintiffs by their bill do not profess to sue as well for the other creditors of *Stephen Scotton* as for themselves. From the facts which they set forth, it appears, that they were the holders of a vendor's lien to secure the payment of the balance of the purchase money; and as such, in their proceeding to have the land sold for the payment of their claim, they had no such common interest with the other creditors of *Stephen Scotton*, as would enable them to sustain a creditor's suit for the administration of his estate. (q) Yet from the manner in which the bill speaks of the insufficiency of the personal estate; and on having made *Ashur Foulke*, the administrator, a defendant, it may be inferred, that the plaintiffs contemplated their bill as the commencement of a creditor's suit. The decree of the 5th of April 1822, by reciting, that the deceased *Stephen Scotton* did not leave personal estate sufficient for the payment of his just debts; and by directing the land to be sold for the payment of the claim of the complainants and of such other debts of the deceased as should be established to the Chancellor's satisfaction, evidently considers the proceeding as a creditor's suit. But no notice has been directed to be given to the creditors of the deceased to bring in their claims; nor has any decree to account been passed against the administrator; on the contrary, all claim against him, as well by the plaintiffs to obtain satisfaction of their debt, as by these heirs to have the real estate descended relieved, by the application of the personalty which might be found in his hands, seems to have been wholly abandoned.

It now appears that the defendant, *Ashur Foulke*, the administrator, who had been appointed to make the sale, is dead; and that the suit had thus abated as to him. A suit which has abated as well in regard to the real as to the personal estate may be so revived as to proceed against either, leaving the abatement to stand as to the other. (r) So here, as this abatement does not

(q) *Ellicott v. Welch*, ante 244; *Hammond v. Hammond*, ante 344.—(r) *Colgate D. Owings' case*, 1 Bland, 409.

affect the plaintiff's claim, or their proceedings against the realty, founded upon their equitable lien, it may be suffered to stand; and the case be allowed to proceed in all other respects; and for that purpose it will only be necessary to appoint some person to take the place of the deceased trustee.

Whereupon it is *Ordered*, that *James Boyle* be, and he is hereby appointed trustee, to carry the decree into effect; and in all respects he will be governed by, and pursue the directions of the decree in the same manner as if originally appointed trustee.

The surveyor, *John W. Duvall*, by his petition filed on the 3d of October, 1827, stated, that there was then due to him from each of the parties the sum of \$15 for the survey made by him under the order of the 8th of January, 1823. Whereupon he prayed, that the trustee *Boyle*, and *Samuel Anderson* might be each of them ordered to pay him that amount.

3d October, 1827.—BLAND, Chancellor.—*Ordered*, that *James Boyle*, the trustee, pay to *John W. Duvall* the sum of \$15 for his services, as stated in his petition. And it is further *Ordered*, that *Samuel Anderson* pay to *John W. Duvall* the sum of \$15 for his services as above stated; or that they, *Boyle* and *Anderson*, shew cause to the contrary on the first day of November next. Provided, that a copy of this order be served on each of them before the fifteenth day of the present month.

The trustee *Boyle*, on the 2d of November, 1827, filed his answer shewing cause against this order; in which he states, that although he admits, that the services were performed by the surveyor, and that his charge is reasonable; yet he did not render his account to the register until the 3d of October, 1827; that in consequence of this neglect the register in taxing the costs, set out in the record, transmitted to the Court of Appeals, had not included the fees now claimed by the surveyor; that a *fieri facias* was issued against *Anderson* from the Court of Appeals for the costs, and charges of the two courts as taxed by the register and clerk; that it would be unjust, that the estate of *Stephen Scotton* should have to pay these fees, now claimed by the surveyor without having any resort to *Anderson*, as the *fieri facias* so issued from the Court of Appeals has been fully satisfied.

The time of hearing this matter having been enlarged, *Anderson*

also came in on the 20th of March, 1828, and shewed for cause against this order, that the orders of the 8th of January and 17th of April, 1823, under which those surveyor's fees had accrued, having been affirmed, they could not now be opened for the purpose of taxing the costs anew. And that the surveyor had by his own neglect precluded himself from claiming those costs; because *Anderson* could not have recovered them from the trustee in case the order of ratification had been reversed.

24th March, 1828.—BLAND, *Chancellor*.—The matter of the petition of the surveyor standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

It is very clear, that if the surveyor had made out a bill of his legal fees upon the plot and certificate returned by him on the 19th of March, 1823, they would have been taxed by the register as a part of the costs properly incident to the order of the 17th of April, 1823, from which *Anderson* appealed; and consequently, would, with the other costs arising out of the same controversy, have been ordered by the Court of Appeals, in their affirmance of that order of the 16th of July, 1825, to be paid by *Anderson*. Hence it is evident, that *Scotton's* estate should not now be charged with these fees, as those who claim that estate have no means of obtaining reimbursement from *Anderson*, now that their *fieri facias* on that judgment of the 16th of July, 1825, of the Court of Appeals, has been fully satisfied; for it is not pretended, that it was, in any respect, their fault, that the surveyor's fees were not comprehended by that judgment. It is evident, that these fees ought to have constituted a part of the costs which *Anderson* was ordered to pay by the judgment of the Court of Appeals; but now, in this stage of the proceeding, after the affirmance of the order of the 17th of April, 1823, this court has no power to open that judgment, so as to let in these costs as a part of it; nor can this court now, in this summary way, enforce the payment of any sum of money which ought to have formed a component part of that judgment, and which had been omitted by the negligence of the party himself. If the surveyor has any remedy, it must be by a special action on the case against *Anderson*. Therefore, it is *Ordered*, that the said petition be, and the same is hereby dismissed with costs.

The trustee *Boyle*, by his petition, filed on the 26th of July, 1828, stated, that the Court of Appeals had affirmed the order of

the 12th of May, 1826, whereupon he prayed an attachment against *Anderson* to enforce obedience to that order; which was granted as prayed, returnable to the then next term.

23d September, 1828.—BLAND, *Chancellor*.—*Samuel Anderson* having been brought into court on an attachment to enforce obedience to the order directing him to pay the amount of the purchase money then due; and the trustee having prayed, that he, *Anderson*, be committed, he produced a certificate from the clerk of Anne Arundel County Court, of his personal discharge by that court under the insolvent laws. Whereupon it is *Ordered*, that the said *Samuel Anderson* be, and he is hereby discharged from custody, according to the provisions of the act of assembly in such case made and provided. (s)

The trustee *Boyle*, by his petition, filed on the 21st of February, 1829, stated, that the land sold to *Samuel Anderson* would not now bring near the amount he had contracted to pay for it; that the sureties, *James Anderson* and *John Stewart*, in the appeal bond given by *Samuel Anderson* on his appeal from the order of the 12th of May, 1826, were sufficiently good. Whereupon the trustee *Boyle* prayed the advice and direction of the court in what manner to proceed; by passing an order, that a re-sale should take place, or that the bond should be sued, or both; and if a re-sale should take place, that *Samuel Anderson* and his sureties should pay the difference, or such other relief as might be consistent with the circumstances of the case.

25th February, 1829.—BLAND, *Chancellor*.—This petition of the trustee having been submitted, the proceedings were read and considered.

On a sale of real estate, made under an order or decree of this court, it retains an equitable lien until the purchase money is paid; this lien stands in all respects upon the same footing as a vendor's lien in case of a sale by a private person; and is in no instance weakened or destroyed by the bonds or notes which the trustee may be directed to take from the purchaser; nor can it be at all impaired or relinquished by any act of the trustee not sanctioned by the court. This lien arises from and is incident only to the relationship of seller and purchaser; and is peculiarly and exclusively

a privilege of the vendor. These principles of equity I take to have been long and well established here as well as in England. (t)

It may be regarded as a general rule, that the obtaining of one security does in no instance operate as a suspension or extinction of any other security for the same claim; and that the party may, in all such cases, obtain redress either on the one or the other of them at his option. This rule might be exemplified by a great variety of cases to be met with in the books. (u) The case under consideration is an example shewing, that where a purchaser has given bond with surety to the trustee, as required by the decree, there are three distinct securities for the payment of the purchase money. The equitable lien, under which the land may be re-sold. The personal liability of the purchaser, upon which he may be proceeded against in a summary way by attachment. And the bond upon which the purchaser and his sureties may be sued at law. There can be no doubt, that the payment of the purchase money may be enforced by proceeding upon either one of these securities separately; since there is nothing in either incompatible with the contemporaneous existence of the others; nor does the acceptance of any one operate as a suspension or extinction of the others; or imply an abandonment of them.

But there is a material difference between securities for the payment of money and the remedies founded upon such securities; for, although there may be nothing in such securities themselves inconsistent with their mutual existence; yet the institution of a suit upon one may, from its nature, amount to a suspension or waiver of the remedy upon the others at the same time. The English statutes require, that the party who sues out a commission of bankruptcy shall give bond in the penalty of £200, to answer to the party grieved by falsely and maliciously suing out such commission; and the giving of such bond, it has been held, does not take away the common law remedy by action on the case. But the party grieved cannot sue on both at the same time; because in the action on the case he submits to the jury whether he is entitled to less or more than £200; and in the action on the bond he decides, that his claim is neither more nor less than the penalty of £200. But he cannot have that penalty in addition to what a

(t) *Meluy v. Cooper*, ante 199, note; *Purnell v. Comegys*, 1806, *per Kilty, Chancellor*; *Bailie v. Harrison*, 1806, *per Kilty, Chancellor*; *Moreton v. Harrison*, 1 Bland, 491; *Iglehart v. Armiger*, 1 Bland, 519.—(u) Ante 655.

jury may say he is entitled to recover. Hence the electing to obtain redress by either one of those modes amounts to a waiver of the other, so that both cannot be prosecuted at the same time. (v)

In most cases however, the party may resort to all his securities and have all his remedies put in operation at the same time. As in the case of a pawn, the right to detain which is not divested by the pawnee's also taking a covenant or further security on which he may sue the person of the covenantor. The covenant is considered as affording an additional remedy and the party may proceed on both. (w) So too the holder of a promissory note or bill of exchange may sue the maker or drawer and each endorser separately at one and the same time; although he can recover but one entire satisfaction. (x) And so too under the process of this court, which is more effectual than that of the common law tribunals; there may be a sequestration against the goods, although the party himself is in custody upon an attachment: whereas at law, if a *capias ad satisfaciendum* is executed there can no *fieri facias* issue. (y)

Where the debt has been secured by a mortgage, a covenant to repay, and a bond, the creditor may be allowed to pursue all his remedies at once. He may bring an action of covenant to repay the money; institute an ejectment against the tenant in possession; file a bill in equity to foreclose; and also maintain a suit upon the bond at the same time. But he cannot have the mortgaged property awarded to him by a decree of foreclosure, and also recover the money or any part of it from the debtor by a suit upon the covenant or bond. (z)

The mortgaged estate is considered as a pledge sufficient for the satisfaction of the debt; and as having been so taken by the parties themselves by the nature of their contract. Therefore if the creditor, on his bill in equity, has a decree to foreclose and nothing more, he is held to have obtained that kind of satisfaction of his claim for which he stipulated; and if after such a decree he sues upon the bond, he thereby opens the decree, and admits the right of the mortgagor to redeem; because by the institution of the suit he disclaims the satisfaction he had obtained by the

(v) *Holmes v. Wainwright*, 1 Swan. 23; *Cotterel v. Hooke*, 1 Doug. 97.—(w) *Smart v. Wolff*, 3 T. R. 342.—(x) *Smith v. Woodcock*, 4 T. R. 691.—(y) *Morrice v. The Bank*, Cas. Tem. Tal. 222; *Martin v. Kerridge*, 3 P. Will. 240.—(z) *Powel Mortg.* 204, 966; *Toplis v. Baker*, 2 Cox, 123.

decree. And if he has placed it out of the mortgagor's power to redeem, by aliening the estate after the decree, he will be perpetually enjoined from proceeding upon the bond. But if the creditor on his bill in equity, instead of a decree to foreclose, obtains a decree for a sale; and the mortgaged estate sells for less than the debt, the balance may be recovered in an action on the covenant or bond, without opening or affecting such a decree for a sale, by which the pledge itself is not taken as a satisfaction as by a decree to foreclose. (a) Hence it is evident, that the use of a mortgage covenant, or bond to repay is to enable the mortgagee to recover his debt as far as practicable, in that way, leaving him to his right of foreclosure, or sale of the mortgaged property, for the recovery of the balance; or as a means of recovering the residue of his debt by an action on the bond or covenant, in case the estate on a sale should prove inadequate to the burthen of the mortgage money. (b)

The court has been authorized by an act of assembly to decree a sale of the mortgaged property; (c) but the provisions of that act have been always considered as having merely introduced an additional remedy, and not as having abrogated any pre-existing mode of relief, to which the mortgagee was entitled, or to have altered the proceedings in this court on mortgages, in any other respect whatever; and therefore, the mortgagee may now, notwithstanding the provisions of that law, have a decree of foreclosure instead of a decree for a sale. (d) If the creditor files a bill on the mortgage,

(a) *Goodman v. Grierson*, 2 Ball & Bea. 279; *Davis v. Battine*, 6 Cond. Cha. Rep. 404.—(b) *Powell Mortg.* 15, note L.; *Tooke v. Hartley*, 2 Bro. C. C. 126; S. C. 2 Dick, 785; *Perry v. Barker*, 8 Ves. 527; S. C. 13 Ves. 196; *Greenwood v. Taylor*, 4 Cond. Cha. Rep. 381.—(c) 1785, ch. 72, s. 1, 2 & 3; 1837, ch. 292.—(d) *Atkinson v. Hall*, ante 371, note.

WARDROP v. HALL.—This bill was filed on the 21st of November, 1748, by John Wardrop against Joseph Hall, to foreclose a mortgage on a tract of land, which the defendant had given to the plaintiff to secure the payment of three hundred pounds sterling, with interest. The defendant by his answer admitted the mortgage, and that no part of the principal or interest of the debt had been paid; but alleged that the mortgaged land was an ample security for the debt, the improvement thereon alone being worth, at a moderate valuation, at least six hundred pounds sterling; and therefore he prayed to be allowed a reasonable time to redeem, &c.

May, 1749.—*OGLE, Chancellor.*—It appearing to this court that a sum of three hundred pounds sterling was, on the 17th day of October, 1747, lent and advanced by the complainant to the defendant on the said mortgaged premises, as a security for the repayment of the said sum, with the interest thereof. It is therefore *Decreed*, that in case the defendant doth not, on or before the 30th day of September next, pay unto the complainant the said sum of three hundred pounds sterling, with lawful

and obtains a decree for a sale; and the proceeds of sale should not satisfy the debt, he cannot have a decree in equity on such

interest for the same, as also the costs expended by the complainant in this suit, the said defendant, and all claiming by, from, or under him, shall be for ever, and they are hereby from thenceforth debarred and foreclosed of all manner of equity of redemption or reclaim in and to the said mortgaged premises; and that the said complainant have an absolute estate in the same, free from all redemption and equity and power of redemption of, in, or by the said defendant, his heirs or assigns, or any person or persons claiming by or under them.—*Chancery Proceedings, lib. J. R. No 5, fol. 519.*

HUNTER v. GAUNT.—This bill was filed by Adam Hunter, heir at law and devisee of James Hunter, late of the state of Virginia, deceased, and Robert Purviance and Samuel Purviance, of Baltimore county, administrators with the will annexed of the said James Hunter, against Fielder Gaunt, of Frederick county, to foreclose a mortgage. The defendant answered, and the case was brought before the court.

27th February, 1790.—**HANSON, Chancellor.**—This cause standing for hearing, and the court having duly considered the bill, answer, proofs, and exhibits therein; it is *Decreed*, that the said defendant do and shall pay and satisfy to the complainants, Adam Hunter and Robert Purviance, the surviving administrator of the said James Hunter, the sum of £6,294 1s. 1d. current money, with interest from the 13th of December, 1769, together with all costs by the complainants in this suit expended before the 13th day of October next ensuing; or that the defendant pay to the complainants aforesaid, on the said 13th day of October, between the hours of 10 and 12 in the forenoon of the same day, at the chancery office in the city of Annapolis, the sum of £14,161 12s. 4d. current money, being adjudged and decreed by this court to become due on the said day, for the principal and interest on the mortgage in the complainant's bill mentioned; that is to say, the sum of £6,294 1s. 1d. current money being adjudged and decreed to be due for the principal of the said mortgage, on the 13th day of December, in the year of our Lord 1769; and the sum of £7,867 11s. 3d. current money being adjudged and decreed to become due for the interest of the said mortgage on the said 13th day of October, in the year of our Lord 1790, if the principal and interest be not before paid; and upon payment of the principal sum of £6,294 1s. 1d. with interest as aforesaid, or of the sum of £14,161 12s. 4d. current money, and costs of suit aforesaid, on the said 13th day of October in the present year as aforesaid, the said Adam Hunter and Robert Purviance, their heirs or assigns, shall make and execute to the said defendant a good and sufficient release, in fee simple, of the said mortgaged premises and every part thereof.

And it is further *Decreed*, that if the said Fielder Gaunt, the defendant, shall fail or neglect to pay and satisfy unto the said Adam Hunter and Robert Purviance the sum of principal money and interest hereby decreed, and the costs of suit, on or before the said 13th day of October as aforesaid, that then from and immediately after the said 13th day of October, in the said year of our Lord 1790, the said defendant, his heirs, executors, administrators, and assigns, shall be for ever and they are hereby from thenceforth debarred and foreclosed of and from all manner of equity of redemption or reclaim in or to the said mortgaged premises in the bill mentioned, and every part and parcel thereof; and that the said Adam Hunter, the complainant, shall and may retain the same to him and his heirs, absolutely and fully discharged from the said Fielder Gaunt, his heirs and assigns forever.

BUCHANAN v. SHANNON.—17th March, 1800.—**HANSON, Chancellor.**—The said

bill against his debtor, for the balance of the debt; because it would be at variance with the substantial nature of the case set out in his bill; which is, that he should by that proceeding *in rem*, obtain satisfaction of his claim from the pledged subject itself, either by having an absolute title assured to him in the form of a foreclosure; or by having it sent into the market, and the money due to him, raised by a sale; and not that he should be allowed to enforce payment of his whole debt, by proceeding against the person of his debtor, or against any other of his property than that so mortgaged. And besides, to pass a decree for the payment of the balance, would be to grant relief in a case, where it is most manifest, the creditor might be as effectually relieved at law. (e) But there is no rule of equity by which he can be delayed or enjoined from recovering the balance remaining so unsatisfied, in an action at law upon the bond, note, covenant, or assumpsit. And these principles of equity appear to have been indirectly recognized by the legislature, in an act for the benefit of foreigners, who lend money on mortgage here, by which it is declared, that if sufficient be not raised in such case, by a sale for the satisfaction of such foreign creditor, the court shall decree the balance to be paid by the mortgagor; (f) and they appear to have been in like manner recognized, by an adjudication of the Court of Appeals. (g)

cause standing ready for hearing, the bill, exhibits, and all other proceedings, were by the Chancellor read and considered. It is thereupon *Decreed*, that the bill of the complainant, George Buchanan, against Michael Shannon, the defendant, be taken *pro confesso*; and that unless the defendant, Michael Shannon, shall on the 1st day of October next bring into this court, to be paid to the complainant, the sum of £252 10s. 6d. current money, which will be the sum on that day due for principal and interest on the mortgage in the bill mentioned; or at any time before the said day shall bring into this court, to be paid to the complainant as aforesaid; or pay to the complainant the sum of £170 12s. 6d. current money, with interest from the 1st day of October, 1792, until the time of bringing in or actual payment, he shall for ever be barred or foreclosed from all redemption or equity of redemption of the lot in the bill and mortgage mentioned; and the complainant, his heirs and assigns, shall be entitled to hold the same free, clear, and discharged from all claim of the said defendant. Provided always, that if the said absent defendant, his heirs, devisees, or representatives, shall appear in the Chancery Court at any time within eighteen calendar months from the date of the decree, *viz.* before the 18th day of September, 1801, and require a review of this decree, the Chancellor, upon bill filed by the said defendant, or his heirs, devisees, or representatives, shall proceed to an examination of the matters in dispute, and to a final decree, in the same manner as if the said defendant had originally appeared before him.—[1795, ch. 88, s. 1.]

(e) *Powel Mortg.* 15, note L; *Wood v. Fulton*, 2 H. & G. 72.—(f) 1784, ch. 58.—(g) *Wood v. Fulton*, 2 H. & G. 72.

Hence, it is clear, that in all cases, either before or after a decree for a sale, if the mortgaged estate should not sell under the decree, for enough to satisfy the debt, the creditor may prosecute or institute a suit upon the bond, or any other collateral security, and recover the balance.

The equitable lien held by the court, as in this instance, is in the nature of a mortgage; the estate may be sold under it, as under a decree upon a mortgage; (*h*) and considered as a security for the payment of money, it is, to all intents and purposes, a mortgage. And there is nothing, according to any fair principle of analogy, which should forbid the pursuing of any other remedy for the recovery of a debt, secured by such an equitable lien, any more than suing on a bond for a debt secured by a mortgage.

In this case, there has been no bond or note given directly for the payment of the purchase money. The appeal bond was not given for the payment of the purchase money as such. But, by the order of the 12th of May, 1826, it was adjudged, that *Samuel Anderson*, was in fact, the purchaser, and that he should pay the amount of the purchase money. From which order, he appealed, giving bond in the usual terms, to prosecute his appeal with effect; that is, to have the order reversed, or if it should be affirmed, to pay the amount so ordered. (*i*)

The orders of this court, absolutely affirming the sale, and requiring the purchase money to be paid, are substantial parts of that contract between the court and the purchaser, upon which the equitable lien rests. The appeal bond is a security, that the order directing the purchase money to be paid, if affirmed, shall be complied with; consequently, it must be considered as standing in the same relation to the equitable lien, that a common bond does to a mortgage, to secure the same debt. They are treated as separate securities, having for their object, the assurance of the payment of the same debt; and therefore, the remedy on each may be pursued at the same time, and prosecuted on both, until an entire satisfaction has been obtained.

But the purchaser, *Samuel Anderson*, has been taken in execution, under an attachment, and personally discharged, under the insolvent laws; (*j*) yet, as that cannot operate as a bar to any of

(*h*) *Ex parte Hunter*, 6 Ves. 94.—(*i*) *Karthauss v. Owings*, 6 H. & J. 134; *Wood v. Fulton*, 2 H. & G. 72.—(*j*) 1825, ch. 122, ante 663.

the creditor's other remedies for the recovery of his claim ; (*k*) and as it is not improbable, that a portion of the purchase money may be obtained from his estate ; and if so, it is fit and proper that he, as the principal debtor, should be made to pay as far as satisfaction can be obtained from him, or his estate, in relief of his sureties in the appeal bond ; I shall therefore *Order*, that the lands be re-sold ; that the trustee of this court, apply to the trustee of *Anderson*, under the insolvent laws, and endeavour to obtain a dividend of his estate, if there be any ; and also, that the trustee of this court, put the appeal bond in suit.

Whereupon it is *Decreed*, that the trustee *James Boyle*, proceed immediately to make sale of the said land for the payment of the purchase money due thereon ; and the said sale shall be at the risk of the said *Samuel Anderson* ; and the terms of the said sale shall be for ready money, to be paid on the day of sale, or on the day of the ratification thereof, with legal interest from the day of sale ; in all other particulars, the trustee is directed to conform to the decree of the 5th of April, 1822, according to which, and the order of the first of March, 1827, he has given bond for the faithful discharge of the trust reposed in him, by that or any other decree or order, in the premises. And it is further *Decreed*, that the trustee *James Boyle*, without delay, make application to the trustee of the said *Anderson*, under the insolvent laws, and by all lawful ways and means, endeavour to obtain a dividend of his estate, if there be any, in proportion to the whole amount of the principal and interest of the purchase money, and costs due and owing from the said *Anderson*. And it is further *Decreed*, that the trustee *James Boyle*, do also forthwith institute suit upon the said appeal bond, and prosecute the same without delay, until he shall obtain full satisfaction, if to be had, of the said obligors, of the whole amount of principal, interest and costs, recoverable thereon. And it is further *Decreed*, that the trustee *James Boyle*, bring into this court, all sums of money he may receive or recover in any of the modes herein before specified, and make report of his proceedings accordingly, to the end, that no more may be collected by the said several modes of proceeding, than one entire satisfaction of the whole amount of principal, interest and costs, which ought to be paid by the said *Samuel Anderson*.

Under this decree, the trustee proceeded to make sale of the land which had been previously sold to *Samuel Anderson*; and on the 27th of April, 1829, reported, that he had made sale of it; upon which, it was *Ordered*, that the sale should be ratified, unless cause was shewn to the contrary, before the 27th of June, then next.

The plaintiff *Andrews*, by his petition, filed on the 17th of June, 1829, stated, that the sale as reported, had been made for \$3 10 per acre; that he had, by a letter to the trustees, before the day of sale, offered, and was then willing to give \$3 57 per acre, for the land. He expressly admits, that there was no fraud in the transaction; but prays that a new sale may be ordered, so that he may be let in to bid the amount he had previously offered. The trustee admitted the truth of the facts so stated by *Andrews*.

18th June, 1829.—BLAND, *Chancellor*.—This petition of the plaintiff *Andrews*, having been submitted without remark, the proceedings were read and considered.

I have before said in this case, that there has been no instance of opening the biddings here, merely to let in a higher bid; and this is the first proposition of the kind, that I have any knowledge of having ever been made to this court. (l) If any small advance in price, such as that now offered, were to be admitted as a sufficient ground for letting in a new bidder, to the exclusion of the reported one, it is obvious, that the practice might greatly embarrass sales under decrees of this court. By adopting the English practice of opening the biddings, as it is called, the regularity of public sales by trustees, as practised here, would be virtually broken in upon, and destroyed by the court itself; bidders would be discouraged; sales delayed; and the expense much increased; for it could not be deemed proper to receive a bid in any form, without allowing a day to all interested, to come in, and shew cause why the sale should not be ratified. Upon general principles of convenience and economy therefore, I deem it improper in any case, to reject a reported sale, merely to let in a higher bid, where no fraud, misrepresentation or unfairness is pretended or charged. Whereupon it is *Ordered*, that the said petition be, and the same is hereby dismissed with costs.

(l) *Bealmere v. Warfield*, 1st October, 1830, *per Bland, Chancellor*, a similar application to open the biddings, was rejected.

After which, no cause having been shewn, the sale as made and reported by the trustee *Boyle*, was, on the 29th of June, 1829, finally ratified and confirmed. And some time after, a motion was made to adjust the commission on the sale of the 28th of August, 1822, as between the late and the present trustee.

28th May, 1830.—BLAND, *Chancellor*.—*Ordered*, that a commission be allowed on the sale, ratified by the order of the 17th April, 1823, according to the rule of the court; two-thirds thereof to be awarded to the late trustee; and the residue to the present trustee.

The auditor on the 22d of July, 1830, filed a report, in which he says, that he had stated an account between the estate of *Stephen Scotton*, and the late trustee *Foulke*, in which he had applied the proceeds of the sale of the 28th of August, 1822, as of that day to the payment of the trustee's commission, costs of suit, and the claim of the complainants; leaving a balance of \$427 24 unappropriated. The original decree provides, that the said estate shall be sold for the payment of the claim of the complainants, and such other debts as shall be established to the Chancellor's satisfaction. But no notice has been given to creditors to produce their claims, nor has any other claim been filed.

22d July, 1830.—BLAND, *Chancellor*.—On referring to the order of the first of March, 1827, it will be seen why it is deemed unnecessary now to give notice to the creditors of *Stephen Scotton*, deceased, to bring in their claims, as suggested by the auditor. As this report of the auditor relates exclusively to the application of the proceeds of the first sale, the balance therein spoken of, must remain unappropriated until further order.

Ordered, that the foregoing report and statement of the auditor, be, and the same are hereby ratified and confirmed; and the trustee is directed to apply the proceeds accordingly, with a due proportion of interest, that has been or may be received; reserving the unappropriated balance until further order.

See this case as *Anderson v. Foulke*, 2 H. & G. 346.

WARING v. WARING.

This court may appoint a guardian for a female infant above eighteen and under twenty-one years of age.—A sale of the realty to save the personalty can only be made at the instance of one who has an interest in both estates; and without prejudice to creditors.—A widow may have dower out of the real estate so sold; but not a distributive share also of the personalty so saved.—A suit for the sale of the realty to save the personalty must be treated as a creditor's suit.

THIS bill was filed on the 20th of September, 1830, by *John Waring*, against *Henrietta M. Waring*, *Catherine H. Waring*, *Susan Waring*, *Grace Waring*, *Eleanor Waring*, *Eliza Waring*, *Richard M. Waring*, *Sally Waring*, and *Sarah C. Waring*. The bill states, that the plaintiff's father *Henry Waring*, died seized and possessed of a large real and personal estate, and indebted to an amount equal to the whole value of his personal property, leaving a widow, the defendant *Sarah C. Waring*, and the other parties his children and heirs at law; that the defendants *Susan* and *Grace*, were between eighteen and twenty-one years of age; and that the defendants *Eleanor*, *Eliza*, *Richard*, and *Sally*, were minors under the age of eighteen years, for whom their mother, the defendant *Sarah C. Waring*, had been appointed by the Orphans Court, and then was their actual guardian. That the late *Henry Waring* died seized of a tract of land called *Mount Pleasant*, containing about six hundred acres, and a tract called *The Wedge*, containing about three hundred acres, lying in Prince George's county; and a tract of land called *Schekles Chain*, and *Lot No. 57*, lying in Anne Arundel county, containing about two hundred acres. That a large proportion of the personal property of the deceased had been sold for the payment of his debts; and that if any more of it, especially negroes, should be sold, there would not be enough left for the purpose of carrying on and working to advantage the real estate which had been left to descend to the children and heirs at law of the deceased. Whereupon the bill prayed, that the lands in Anne Arundel might be sold and the proceeds applied to the payment of the debts of the deceased.

The plaintiff by his petition, without oath, stated, that the defendants *Susan* and *Grace Waring* being infants, between the ages of eighteen and twenty-one years, could not have an actual guardian appointed for them by the Orphans Court. Whereupon he prayed that a guardian might be appointed for them by this court.

22d September, 1830.—BLAND, Chancellor.—Upon a careful

consideration of the several legislative enactments in relation to the ages at which females are to be endowed with certain capacities, it will be seen, that it has been merely declared, that a female shall be accounted of full age to receive her estate at the age of *eighteen*, or day of marriage, which shall first happen; (a) that on receiving her estate after that age she may execute a release therefor to her guardian; (b) and that no will shall be good and effectual to pass any interest in land unless the person making the same, if a female, be of the full age of *eighteen* years. (c) And following out those principles upon which a capacity to receive, hold, and dispose by will of their estates at the age of *eighteen*, was conferred upon females, the jurisdiction of the courts, clothed with the common and ordinary powers in relation to infants, has been accordingly limited by declaring, that the Orphans Court should only have authority to appoint a guardian to a female infant until the age of *eighteen*, or marriage; and that such guardian should then account and deliver up all the property in his possession to such female. (d)

But there is nothing in any of those legislative enactments conferring such qualified capacities upon females, or by which the jurisdiction of the Orphans Courts has been so limited which can be construed to have altered the general rule of the common law as to age; or from which females can be construed as of full age at *eighteen* in any other respect, or for any other purpose whatever where the legal capacity has, by the common law, been limited to the full age of twenty-one years. (e) And since it has been expressly declared, in immediate connexion with this matter, that nothing contained in the general act, regulating the powers and duties of the Orphans Court, should be construed to affect the general superintending power exercised by the Court of Chancery with respect to trust; (f) and since it has also been expressly enacted, that a sale of the real estate, as prayed for in this instance, may be decreed in order to save the personal, with the consent of all parties of full age, and the actual guardian of minors; (g) it necessarily follows, that this court alone has the power to appoint

(a) 1715, ch. 39, s. 15; 1829, ch. 216, s. 5, 6.—(b) 1829, ch. 216, s. 7. And since they have been endowed with a capacity to execute powers of attorney for such purposes, 1831, ch. 305, s. 5.—(c) 1798, ch. 101, sub ch. 1, s. 3.—(d) 1798, ch. 101, sub ch. 12, s. 1 and 15; 1829, ch. 216, s. 5, 6.—(e) *Davis v. Jacquin*, 5 H. & J. 100.—(f) 1798, ch. 101, sub ch. 12, s. 16.—(g) 1818, ch. 193, s. 8; *Pue v. Dorsey*, 1 Bland, 140, note; *Partridge v. Dorsey*, 3 H. & J. 305.

a guardian for these minors, who are between the ages of eighteen and twenty-one years, in order to enable all parties to obtain the relief they seek, or which may be beneficial to them. (*h*)

Therefore it is *Ordered*, that *Sarah C. Waring* be, and she is hereby appointed guardian of the said infant defendants *Susan Waring* and *Grace Waring*, with full power and authority to defend and protect the rights and interests of the said infants; and to give any consent that may be deemed necessary and proper for their advantage, in all respects whatever.

Immediately after which, the adult defendants, and the actual guardian of all the infant defendants, appointed by this or by the Orphans Court, put in their answers, and consented that the real estate should be sold as prayed. Whereupon the case was submitted without argument.

27th September, 1830.—BLAND, *Chancellor*.—The general rule is, that the personal estate is the natural fund, and must be first applied to the payment of the debts of the deceased owner, unless he had in some legal and clear manner expressed an intention, that a different disposition should be made of his property. (*i*) But the legislature has authorized the Court of Chancery to depart from this rule, upon the application, and with the consent of those to whom the realty has descended; and to decree a sale of it, in order to save the personalty. (*j*) It is with a view to the exercise of this authority, that this bill has been addressed to this court. As regards the heirs, the next of kin, and the widow, who alone are parties to this suit, it may be viewed merely as a proceeding to have the assets marshalled for their benefit. But the object of having them so marshalled is, so to shift the pressure of the burthen of the debts of the deceased, as to save the personalty for the benefit of these next of kin, who are also the heirs of the deceased. As no one can institute a suit without having some interest in it; so, this is a kind of suit which can only be instituted by one, who as heir, devisee or purchaser, has an interest in the real estate proposed to be sold; and also, an interest in that personal estate which it is proposed to have so saved; or, in other words, a party to a suit of this kind, must have an interest in both the real and the personal estate.

(*h*) *Corrie's Case*, ante 488.—(*i*) *Tait v. Northwick*, 4 Ves. 816; *Hancox v. Abbey*, 11 Ves. 186.—(*j*) 1813, ch. 193, s. 8; 1819, ch. 182.

In this, as well as in all other proceedings which may be brought before the court, in relation to the right of property, it will be proper, however, constantly to bear in mind, that there are certain constitutional limitations, beyond which, the power of the legislative or judicial department cannot be in any manner extended. Neither the legislature nor the court can take property from one citizen and give it to another; and therefore, no part of this real estate can be sold, and taken from these heirs and applied to the benefit of any one, other than these heirs, to the extent of their interest in the personalty, and as the means of saving it. Because the application of the proceeds of the sale of the realty, which belongs to them, to save any personal property from the claims of creditors, which would not, when so saved, belong to them, would be, in effect, to take their property to save the property of others; which cannot be done in any way, or under any form of proceeding whatever. In this instance, the intestate having left children, the widow would be entitled to only one-third of his personal estate *left after the payment of all his debts*; and consequently, in so far as the real estate which has descended to these heirs, may be applied to pay those debts, in order to save the personalty, these heirs do, in fact, thereby become the purchasers of it, as against all but creditors; and the widow can have no claim to any part of it; since the awarding to her any portion of the personalty so saved, would be, in effect, to take the property of the heirs and to give it to her; which cannot be done. She is, however, justly entitled to dower out of the real estate sold; or to an equivalent allowance from the proceeds of the sale; recollecting always, that by coming in, and making claim to an equivalent allowance out of the proceeds of sale, she thereby, tacitly admits the truth of the allegations of the bill; and therefore, must, on that ground also, be precluded from any portion of the personalty thus saved by the proceeds of the sale of the realty.

But the legislature is, by a positive constitutional provision, restrained from passing any law impairing the obligation of contracts; and it is believed, that no court of justice has hitherto ventured to impair the obligation of a contract, or to throw any impediment in the way of a creditor who asked to have his claim enforced against his debtor. This act of assembly must therefore, be so construed, and the authority which has been conferred by it, upon this court, in cases of this kind, must be so applied, as to leave to the creditors of this deceased debtor, no cause to complain.

They must be notified, as far as practicable, of this proceeding, and allowed to bring in their claims; and, upon establishing them, to obtain satisfaction. For, as the avowed object of this suit is to save the personalty from their grasp, by paying them, it must be considered as in effect, a creditor's suit, instituted for their satisfaction; so, that the interests of these parties may be thereby promoted; and therefore, no marshalling of the assets, thus liable to the claims of creditors, can be made in any manner whatever, to their prejudice, however advantageous it may be to these parties.

The proceeds of the sale about to be ordered, might, if it could be done with proper security, be placed in the hands of the administrator of the deceased, to meet, in due course of administration, the demands upon that personal property in his hands, which they are intended to relieve and save from the claims of creditors. But an administrator or executor only gives bond for the faithful administration of the *personalty*, as left by the deceased, which may come to his hands, and nothing else; and therefore, that bond could not be considered as a security for any proceeds of the sale of the realty which this court might direct to be placed in his hands. (*k*) And as this court could not demand any additional security from the administrator of the deceased, even if he were a party to this suit, it must itself call in the creditors of the deceased, and distribute the proceeds of sale among them as usual, in a creditor's suit originally instituted by a creditor in behalf of himself and all other creditors.

Decreed, that the tracts of land lying in Anne Arundel county, called *Schekle's Chance*, and *Lot No. 57*, whereof *Henry Waring* died seized, be sold, and that *Thomas F. Bowie* be, and he is hereby appointed trustee to make the said sale, &c. &c.; to sell the said land and premises at public sale to the highest bidder on a credit of six months, the purchaser to give bond with surety to be approved by the trustee for the payment of the purchase money, with interest from the day of sale, &c. &c. And the said trustee shall, at the time of advertising the said property for sale, give notice to the creditors of *Henry Waring*, deceased, to file the

(*k*) 1831, ch. 315, s. 10 and 11—as to sales of real estate by an *executor*, authorized to sell by his *testator*; and that the bond of an *executor* or *guardian* shall be answerable for the proceeds of the sales of the real estate of the *testator* or *ward*, which may come into his possession.

vouchers of their claims in the Chancery office within four months from the day of sale.

Under this decree the trustee sold the property as directed, which sale was finally ratified on the 15th of December, 1831. After which, the widow was allowed one-eighth of the net proceeds of sale in lieu of her dower; and no creditor having come in as notified, the residue of the proceeds of sale were afterwards, on the application and with the consent of all parties, ordered to be paid over to the intestate's surviving administrator to be by him administered in due course. And the case was thus closed here.

WORTHINGTON v. LEE.

A disclaimer should be explicit, and can only be received from a defendant who is subject to no liability.—All persons having an interest in the object of the suit should be made parties.—Under a *fiery facias* at law against the mortgagor, the purchaser at the sheriff's sale of the equity of redemption for less than the mortgage debt, takes it as incumbered with the residue thereof.—A mortgagor who has not been legally divested of his whole interest must be made a party.—A mortgagor who has an interest in stating the account, or from whom any discovery may be drawn may be made a party.—Although this court cannot, in a suit upon the mortgage, after a sale of the mortgaged property, pass a decree for the payment of the balance thus shown; yet, if the mortgagor be dead, the plaintiff may so amend his bill as to have it treated as a creditor's suit.—It is not necessary to make the personal representative of the mortgagor a party to a bill to foreclose or sell; but upon the death of the mortgagee it is necessary to make both his heirs and personal representatives parties.

THIS bill was filed on the 17th of November, 1829, by *Marcella Worthington*, administratrix of *Thomas Worthington*, deceased, against *Temperance Lee*, *Thomas Lee*, *Joshua Lee*, *John Lee*, *William Lee*, *Caleb Lee*, *Jesse Lee*, *William Byrum* and *Clarissa* his wife, *Independence Houck* and *Matilda* his wife, *John Wilson* and *Penelope* his wife, *Jacob Faner* and *Mary* his wife, *Eleanor Lee*, and *Ushley Lee*. The bill states, that on the 19th of June, 1820, *Robert Lee*, being indebted unto *Thomas Worthington* in the sum of £199 2s. 3½d., gave his bill obligatory for the payment thereof in twelve months thereafter with interest; and on the same day, as a further security for the payment of the debt, executed a mortgage in fee simple, of a tract of land in Baltimore county, called Upper Marlborough; that shortly after *Thomas*

Worthington died intestate, upon which administration of his personal estate was granted to the plaintiff, who, when the money became due, applied to *Robert Lee* for payment, who refused to pay. Whereupon she brought suit against him; and at September term, 1822, of Baltimore County Court, obtained judgment, upon which a *fieri facias*, and *venditioni exponas* were issued, under which the equitable interest of *Robert Lee* in the said land was sold for the sum of \$105, to the defendant *Jesse Lee*, of which sum, after paying therefrom the legal expenses, commissions, and costs, \$68 43 only were paid in part discharge of the debt. Since which time *Robert Lee* died; but that no letters testamentary or of administration on his personal estate had been granted to any one; that he left the defendant *Temperance Lee* his widow, and the defendants *Thomas, Joshua, John, William, Caleb, Jesse, Clarissa, Matilda, Penelope*, and *Mary* his children, and the defendants *Eleanor* and *Ushley*, the children of his son *Robert Lee, Jr.*, deceased, his heirs at law; and that there is due and unpaid to the plaintiff of the mortgage debt the sum of \$800, including interest. Whereupon the bill prayed, that the mortgaged estate might be sold; and that the plaintiff might have such other and further relief as should appear to be consistent with equity and good conscience.

On the 14th of April, 1830, the defendants *Faner* and wife, and *Joshua Lee* demurred to this bill; and for cause shewed, that it appeared by the complainant's own shewing, that the equitable interest of the said *Robert Lee* had been sold under an execution, levied at her instance; and, consequently, that they or either of the heirs of the said *Robert* were not the proper parties to be made defendants.

The defendants *Houck* and wife on the 10th of August, 1830, also demurred to the bill; and for cause shewed, that, by the complainant's own statement, it appeared that both the legal and equitable interest in the lands alluded to in the bill had been parted with by *Robert Lee* and his heirs; and that he, or they, or his representatives were no longer any way concerned with regard to their disposal; and that these defendants were only complained of as the heirs of the said *Robert Lee*.

29th October, 1830.—BLAND, Chancellor.—This case standing ready for hearing on the demurrers of *Faner* and others, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

These defendants, by this form of defence, put it to the court to determine, admitting every fact and circumstance to be true, as stated, whether they ought to be compelled to answer the bill or not. The cause shewn for thus demurring, would seem to amount to a disclaimer; but a disclaimer is never made in this way, or received in this equivocal shape. It should be, in all respects, full and explicit, and accompanied by an answer denying such facts as it may be necessary to deny, in order to make it effectual; because, in all such cases, where the defendant is subject to no liability, which he cannot disclaim, (a) it at once puts an end to the case, without asking for the judgment of the court, as by a demurrer, upon the plaintiff's right to such an answer as he calls for by his bill. These demurrers, it is evident, cannot be treated as disclaimers, merely because of the cause thus loosely shewn for relying on them. The case, as stated by the bill, must, therefore, be carefully considered to ascertain whether or not these persons have been properly made defendants; because of their having an interest in the object of the suit; or because of their being in any way liable to be called here as defendants.

All persons having an interest in the object of the suit, ought to be made parties; but it is often difficult at once to determine, who do come within this general description. Much must always depend upon the peculiar nature of the case; and how it may terminate. If the court itself sees that a person whose interests must be involved in a decree, which it may be called on to pass, has not been made a party to the suit, it will, even at the hearing, suspend its proceedings until he has been brought in as a party. And it lies upon the plaintiff to shew, that in some way in which the suit may terminate, it is necessary for his advantage or protection, that the person who he has summoned as a defendant should be made a party. (b)

These persons may have been rightfully called here as defendants on one of three grounds; either, because of some beneficial interest to which they are entitled, arising out of the nature of their ancestor's contract, and the manner in which it has been partially enforced; or they may have been correctly brought here as defendants, because of their power to draw in question the title of the present claimant of this equity of redemption; and of its therefore

(a) *Glassington v. Thwaites*, 3 Cond. Cha. Rep. 197.—(b) *Calvert on Parties*, 10; *Lloyd v. Lander*, 5 Mad. 289.

being fit and proper, for the peace of all concerned, that their power to do so should be spread upon a record to which they are parties, in order that the matter may be finally put to rest ; or they may have been justly made defendants, in order to draw from them a discovery as to some particulars, material to the relief sought by the plaintiff, as to which they could not be made to speak as witnesses ; because of their not being totally, and in all respects, disinterested.

As to the first ground ; the present interests of these defendants. It must be recollected, that there existed, before the payment of any part of this debt, two entirely distinct interests in this land. The equity of redemption held by the mortgagor ; and the legal right of the mortgagee, subject to that equity. By the sheriff's sale, as stated in the bill, the first of those interests was disposed of, and nothing more. But the proceeds of that sale, to the extent of \$68 43, have been so applied, as in part only, to extinguish the legal right of the mortgagee ; and thus, a third interest has arisen out of the manner in which the two first have been dealt with. To whose benefit shall that extinguishment enure ? The purchaser with notice, as in this instance, at the sheriff's sale, bought and paid for nothing more than the naked equity of redemption ; hence, it is clear, that if he were allowed to take advantage of that, as a total reduction of the incumbrance, he would derive a benefit, for which he had paid nothing, nor given any equivalent whatever, which cannot be admitted. It follows, therefore, that the mortgagor must, at the hearing, or before this case is finally disposed of, be permitted to take the place of the mortgagee to obtain reimbursement, so far as his interest, other than the mortgaged property, may have been taken and applied to the reduction and partial satisfaction of this incumbrance. How such an adjustment is to be made, need not now be determined, as it is a matter which may well be permitted to stand over for further consideration. But to the extent of the reduction of this incumbrance made by the payment of the \$68 43, raised by a sale of the mortgagor's interest, it is perfectly clear, that the mortgagor is a proper and necessary party. (c)

In regard to the second ground. The equity of redemption, and the manner in which it has been sold. In England, it has been held, that where the mortgagor has been declared a bankrupt,

a bill of foreclosure should be brought against his assignees alone, without making him a party. This exemption of the bankrupt from being called on as a party, is, however, expressly founded upon the fact of his whole estate having been vested in his assignees; and of a bill of foreclosure being limited in its nature to the obtaining of satisfaction from a particular fund, in which he had been deprived of all manner of interest by a legal assignment, which he could in no way invalidate, deny, or question; and also, upon the ground, that in no event, nor by any form of decree, could the proceedings in that suit be applied for the benefit of the bankrupt; or be so used, as to make him liable for any thing, or to any amount. For it is admitted, that if such a bill sets forth any kind of actual interest in the bankrupt, which should be bound by the decree, it will be necessary to make him a party to the suit to foreclose. (*d*)

But here the mortgagor is not a bankrupt, nor in the condition of bankrupt; nor in the similar situation, according to our law, of an insolvent debtor, whose whole estate had been vested in a trustee for the benefit of his creditors. There has been nothing stated, nor as yet shewn, by which it appears, that, as in cases of bankruptcy or insolvency, he has been exonerated and discharged from all liability for this debt; so, that if the mortgaged estate should not, of itself, produce a complete satisfaction in the way in which the plaintiff has a right to have it disposed of, the mortgagor could not be called upon to pay the deficiency. (*e*) On the contrary, instead of the mortgagor's having been divested of his estate by an assignment which he cannot controvert, and so as to leave him in no way liable; his equity of redemption alone, has been taken in execution and sold; the fact and validity of which sale he may deny, and put in issue by an action of ejectment, or by a suit in equity of this kind, involving a decision upon the right. (*f*) Hence, it is essentially necessary, that this questionable title to the equity of redemption, as derived from the judicial sale, should be entirely put to rest by calling before the court, as

(*d*) *Griffin v. Archer*, 2 Anstr. 478; *Benfield v. Solomons*, 9 Ves. 77; *Whitworth v. Davis*, 1 Ves. & Bea. 545; *Lloyd v. Lander*, 5 Mad. 282; *Collins v. Shirley*, 4 Cond. Cha. Rep. 592.—(*e*) *Collet v. Wollaston*, 3 Bro. C. C. 228; 1805, ch. 110; 1808, ch. 71; 1812, ch. 77.—(*f*) *Morgan v. Davis*, 2 H. & McH. 9; *West v. Hughes*, 1 H. & J. 6; *Purl v. Duvall*, 5 H. & J. 77; *Barney v. Patterson*, 6 H. & J. 204; *Fenwick v. Floyd*, 1 H. & G. 172.

well the mortgagor, as him who claims as the purchaser, at that judicial sale.

As to the third ground; an account of the mortgage debt, and the discovery in relation to it, to which the mortgagee may be entitled. It is true, that under a bill to foreclose, the court cannot, after causing the mortgaged property to be sold, and the proceeds of such sale to be applied in satisfaction of the debt, go on to decree, that the mortgagor shall pay the balance remaining unsatisfied, by the proceeds of such sale. But although it cannot so decree, and by its own process enforce complete satisfaction by any further proceedings under the same bill, after the mortgaged fund has been exhausted; (g) yet it can, and must have an account stated, to ascertain the exact amount of the mortgaged debt, before a sale can be ordered, or at least, before it can make any application of the proceeds of the sale of the mortgaged estate. In the stating of such an account, the mortgagor has a direct interest; because it fixes the amount of his indebtedness; and the mortgagee also has an interest in it, and in the discovery in relation to it, which may be drawn from the mortgagor; because, in so far as the mortgaged property fails to produce satisfaction of the amount so shewn, the mortgagee may again have recourse to his judgment at law, or avail himself of any other proceeding, either at common law or in equity, to enforce payment of such unsatisfied balance; and therefore, upon this third ground also, it is proper that the mortgagor should be made a party defendant to this suit.

I have spoken of the rights and liabilities of the mortgagor, and of the grounds upon which he should have been made a party to this suit, supposing him to be now alive. He is dead; but the same principles apply with equal force to his heirs; they stand in his place to the extent of his interest in the mortgaged estate, whatever it may be; and they have succeeded to his liability for the debt so far as real assets may have descended to them; and that too, according to our law, whether it be considered as a simple contract or specialty debt; so that if the mortgaged fund should turn out to be insufficient, the plaintiff may apply to amend the bill by making it a bill in behalf of herself and the other creditors of the intestate *Robert Lee*, and thereby come at the assets so descended; (h) and for aught that appears, there may be abundance

(g) *Andrews v. Scotton*, ante 668.—(h) *Brocklehurst v. Jessop*, 10 Cond. Cha. Rep. 136.

in their hands to satisfy the whole of this claim should the mortgaged property be found deficient.

These heirs then, are properly here in respect to an interest which enures to them by reason of the application of the proceeds of the sale of the equity of redemption to the extinguishment of the incumbrance; and also in regard to the title to the equity of redemption itself which may here, or otherwise be drawn in question by them; and moreover for the purpose of having an account taken of the mortgaged debt; and of making discoveries in relation to it; and therefore I shall over-rule their demurrers.

It is not necessary to make the personal representative of the mortgagor a party to a bill to foreclose, or to sell; because the plaintiff need only make him a party who holds the equity; and the mortgagee is not bound to intermeddle with the personal estate, or to run into an account of it; and if the heir would have the benefit of any payment made by the mortgagor or his executor or administrator, he must prove it. (i) This plaintiff could not, therefore, have been required to state, as she has done in her bill, or to prove, that no letters testamentary or of administration had been granted of the personal estate of *Robert Lee*, deceased, the mortgagor; and consequently, that allegation of the bill may be passed over as mere surplusage.

But this is a bill by the administratrix of the mortgagee to obtain payment of the debt, as she specially prays, by a sale of the mortgaged estate; and the suit may terminate in a redemption; in a mere foreclosure; or in a sale of the mortgaged property. From the nature of the case therefore, it is indispensably necessary, that all persons should be made parties to it whose rights may be involved by either of those alternatives; or who may be called on to execute a conveyance; or who should be bound by a decree terminating in either of those modes, in favour of a purchaser under a decree for a sale, or in any other way.

It has always been held, that upon the death of the mortgagee, his heir cannot be allowed to exhibit a bill to foreclose without making his executor or administrator also a party, who may have a right to the mortgage money; (j) and it is now settled, on the other hand, that, in such case, the executor or administrator of the mortgagee cannot alone bring a bill to foreclose without making

(i) *Powel Mortg.* 968.—(j) *Freak v. Hearsey*, 1 Cha. Ca. 51; S. C. 2 Freem. 180; S. C. Nelson, 93.

the heir a party ; because, if the mortgagor should redeem, there would be no one before the court by whom an effectual conveyance of the legal estate could be made. (*k*) According to the course of the court, under a bill to foreclose, the mortgagor must, by the decree, be allowed time to come in and redeem ; and he can only be foreclosed, or the mortgaged property ordered to be sold, on his failing to do so, within the specified time. If he should pay the whole mortgaged debt with interest and costs as required, then, in all cases now, and according to the express terms of the older decrees, he will be entitled to have the legal estate re-conveyed to him. (*l*) But, in this case, those heirs of *Thomas Worthington*, deceased, who hold that estate, and who alone could make such a re-conveyance ; and whose rights, in that respect, ought to be bound by any decree which may be passed for a sale in favour of purchasers and others, have not been made parties to this suit. This case must therefore stand over, with leave so to amend as to have them brought in as parties.

Whereupon it is *Ordered*, that the demurrer of the defendants *John Faner* and *Mary* his wife, and *Joshua Lee* be and the same is hereby over-ruled ; and they are hereby required to make answer to the said bill of complaint ; and it is further *Ordered*, that the said defendants pay to the plaintiff the sum of £5 current money and the costs of the demurrer to be taxed by the register ; and be in contempt until the said sum of money and costs be fully discharged and paid.

And it is further *Ordered*, that the demurrer of the defendants *Independence Houck* and *Matilda* his wife, be, and the same is hereby over-ruled, and they are hereby required to make answer to the said bill of complaint ; and it is further *Ordered*, that the said defendants pay to the plaintiff the sum of £5 current money and the costs of the demurrer to be taxed by the register ; and be in contempt until the said sum of money and costs be fully discharged and paid.

And it is further *Ordered*, that this case stand over with leave so to amend as to make the heirs of the mortgagee, *Thomas Worthington*, plaintiffs or parties to this suit. (*m*)

(*k*) Powel Mortg. 970 ; *Wood v. Williams*, 4 Mad. 185 ; *Morgan v. Davis*, 2 H. & McH. 16.—(*l*) *Hunter v. Guant*, ante 667.

(*m*) Since the passing of this order it has been declared, that where any conveyance of any freehold estate by way of mortgage to secure the payment of any debt has been executed, and the mortgagee shall depart this life, the receipt of his execu-

DUVALL v. THE FARMERS' BANK.

A petition for the production of books and papers to be used on a trial at law, must give a sufficient description of such documentary evidence.

THIS petition was filed on the 11th of October, 1830, by *Grafton B. Duvall* against *The President, Directors and Company of the Farmers' Bank of Maryland*. The petition states, on oath, that the petitioner had been sued by the defendant in Anne Arundel County Court, on two several promissory notes, endorsed by him and a certain *Richard Duvall*, and drawn by the late *Lewis Duvall*, that those suits stand for trial at the next term of that court; that the books, writings and papers of the said bank now in its possession or power, contain material and necessary evidence; and that he cannot safely proceed to the trial of those cases without the benefit of the said testimony. The petitioner

tor or administrator in full acknowledged and recorded in manner and time as prescribed for acknowledging and recording conveyances of lands by way of mortgage, shall have the same effect as a release to the grantor. 1833, ch. 181, s. 1. And moreover, that it shall not be necessary in any cause of foreclosure or sale of mortgaged property, to make the heirs of the mortgagee parties to the same; but that any decree upon any bill for foreclosure or sale aforesaid, filed by the executor or administrator of the mortgagee, shall have the same effect as if the said heirs were parties as aforesaid. 1833, ch. 283.

How far these acts of assembly may have made any material change in the nature of the estate of the heirs of the mortgagee; and their right to have a foreclosure in opposition to the claims of the widow and next of kin upon the fund considered as personalty gathered into the hands of the executor or administrator; or in what manner they operate upon the interests of his heirs or devisees in general; or upon any such peculiar interest as has arisen in this case; or upon the title of a purchaser under a decree for a sale, remains to be determined. For it may be made a question, how far the general assembly can, constitutionally, change the nature of an estate, or dispense with the presence of any one as a party to a suit so as, in effect, to deprive him of his property; or to divest him, arbitrarily, and without compensation, of any pecuniary advantage to which, according to the confessedly legal terms of his contract, he would be entitled. According to the law, as well settled before and at the time when these acts were passed, the mortgagor could not recover in ejectment unless he proved, that the mortgage had been satisfied previous to the bringing of his action; or there was a sufficient foundation to presume such a re-conveyance as extinguished the mortgage. *Powell Mortg.* 397; *Beal v. Harwood*, 2 H. & J. 172. But satisfaction must be shewn by deed or the presumption of a deed; otherwise a legal title might, contrary to the spirit of the law, rest on mere parol proof not recorded, nor sanctioned by circumstances and lapse of time. The proceedings in equity are properly conclusive against the executor or administrator; but upon what principle can they be made to operate against the holder of the legal estate who is no party to them? *Moore v. Plymouth*, 5 Com. Law Rep. 232.

therefore prayed, that the bank might be ordered to produce either the original books, writings, and papers, or copies of such parts of them, certified by a justice of the peace, as contain evidence pertinent to the issue or relative to the matters in dispute between the parties.

11th October, 1830.—BLAND, *Chancellor*.—It is required and *Decreed*, that the President, Directors and Company of the Farmers' Bank of Maryland, on or before the first day of the next term of Anne Arundel County Court, produce, on oath, by the cashier of the said institution, either the original books, writings, or papers, or copies thereof, certified by a justice of the peace, as prayed; provided, that a copy of this order, together with a copy of the said petition, be served on the president or cashier of the said institution on or before the 15th instant; and provided also, that any cause shewn against the execution of this decree may be heard on the 21st instant.

The bank, by its answer, filed on the 12th of October, 1830, shewed cause and insisted, that, before it could be required to produce their books and papers as ordered, the petitioner should specify the particular extract, or writings, or paper which he supposes would be pertinent to the issue in the said cases, without which it would be impossible for it to comply with the order; and it alleged, that it was not aware of any paper being in its possession which would be of service to the petitioner in defending the said suits; or indeed of the defence which he intended to make.

23d October, 1830.—BLAND, *Chancellor*.—This case standing ready for hearing, and having been submitted by the plaintiff on the petition and answer alone, the proceedings were read and considered.

This is a proceeding under the special provisions of the act of assembly, which authorizes this court to require the production of books and papers relative to the matter in issue on a bill instituted in this court, or on the trial of any action at law. (a) In all such cases it should appear, that the applicant has an interest in the document for that special purpose; (b) and the petition should, with some reasonable degree of certainty, designate the books and papers wanted, if practicable, by their marks, number and names; and also should specify the facts expected to be proved by them at

(a) 1798, ch. 84; *McMechen v. McLaughlin*, 4 H. & McH. 166.—(b) *Wigram on Discovery*, 199; *Calvert on Parties*, 10.

the trial in the court of common law. This is a proceeding which can only be regarded as one of the modes whereby a party may obtain testimony to sustain his case; and therefore, as on all similar applications, the granting of which may be attended with delay, where the propriety of granting it does not sufficiently appear from the nature of the case; or the documentary evidence, called for, is not described in the proceedings of the suit in which the application is made, the petition should be at least as specially descriptive of the evidence and proof of facts, expected to be obtained from the books and papers required, as in an affidavit, stating the nature and materiality of the proof expected to be obtained from an absent witness, without whose testimony, a party alleges, that he cannot safely go to trial, and, therefore moves for a continuance of his case in a court of common law. The cases are so strikingly analogous, that the rules and principles, with few exceptions, applicable to one class of cases, may be well applied to the other. (c) In this instance, the petition is entirely too indefinite and general.

Whereupon, it is *Decreed*, that, the cause shewn being deemed sufficient, the decree of the 11th instant be rescinded; and the petition be dismissed with costs to be taxed by the register.

(c) 1 Vern. 334; Jessup v. Duport, Barnar. 192; Steward v. The East India Company, 9 Mod. 387; Smith v. Northumberland, 1 Cox, 363; Burton v. Neville, 2 Cox, 242; Oldham v. Carleton, 4 Bro. C. C. 88; Rougemont v. The Royal Exchange, &c. 7 Ves. 304; The Princess of Wales v. Liverpool, 1 Swan. 119; Jones v. Lewis, 1 Cond. Cha. Rep. 438; Mendizabel v. Machado, 1 Cond. Cha. Rep. 553.

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of his whole debt, 538; *Andrews v. Scotton*, 655, 665.

The assignee of a *chose in action*, takes it subject to all equities.—*Watkins v. Worthington*, 542.

A testator cannot, in any way, place his personal estate beyond the reach of his creditors.—*Addison v. Bowie*, 621.

A legacy to a creditor may, in some cases, be presumed to be a satisfaction of the debt, 625.

DECREE.

A defendant will not be compelled to comply with a decree before he has obtained that which he is first entitled to receive.—*Crapster v. Griffith*, 15.

A decree of the Court of Appeals, cannot be modified by the Court of Chancery; nor, perhaps, even by the Court of Appeals itself, 24.

Interlocutory decree by default against infant as well as adult defendants.—*Townshend v. Duncan*, 47.

A decree against infants for the payment of money, 45.

A decree to account with special directions.—*Cox v. Callahan*, 51.

Decretal order to account.—*Parker v. Mackall*, 64; *Cheseldine v. Gordon*, 81.

Decree in due proportion against several, for the rents and profits of the real estate of the plaintiff held by them during his infancy.—*Cheseldine v. Gordon*, 82.

Interlocutory decree for partition, and to account for the rents and profits as against a trustee.—*Winder v. Dffen-derffer*, 179.

A decree can only be opened on just cause shewn.—*Meluy v. Cooper*, 200.

An order confirming an auditor's report is a judgment final as to the matter to which it relates.—*Contee v. Dawson*, 268.

There may be a decree upon an award made under an order of reference, 276; *Gardner v. Dick*, 277.

The court must decree between co-defendants so as to close the case.—*Contee v. Dawson*, 292.

No decree for a sale should be passed before all the substantial equities between the parties have been settled.—*Lawson v. The State*, 640.

DELIVERY OF POSSESSION.

Possession of land, sold under a decree after the sale has been ratified, may be given, but not before the removal of the crop.—*Tyson v. Hollingsworth*, 334.

After the ratification of the sale, the purchaser may be put into possession.—*Murdock's case*, 464, 468.

DEVISE.

The devise in a certain will held not to pass an estate tail.—*Winder v. Dffen-derffer*, 178.

A devise to the prejudice of creditors is void.—*Campbell's case*, 225, 238.

How and when, under the peculiar expressions of a certain will, the legacies will vest.—*Contee v. Dawson*, 288.

The meaning of a will directing an elder to maintain and educate a younger son.—*Pattison v. Frazier*, 378.

A power of appointment, as given in a certain will, allowed to be arbitrarily exercised.—*Addison v. Bowie*, 618.

Where a testator may put his devisees to an election to take under or in opposition to his will; in such cases the court may elect for infants.—622.

The nature of a devise of a right of habitation, 626.

A devise by a father for the support of the family, must include the support of the devisee's widow, with the maintenance and education of his infant children, 627.

DISCLAIMER.

If one of the defendants answers and disclaims, the bill may be at once dismissed with costs as to him.—*Kipp v. Hanna*, 28; *Worthington v. Lee*, 680.

A disclaimer should be explicit, and can only be received from a defendant who is subject to no liability.—*Worthington v. Lee*, 680.

DISTRIBUTION.

The succession to personal property, on intestacy, is regulated by the law of the deceased owner's last domicile.—*Corrie's case*, 489.

DOWER.

The widow of a vendee can only be endowed of that which remains after the vendor's lien has been satisfied.—*Ellicott v. Welch*, 244.

Real estate sold in a creditor's suit subject to a claim of dower.—*Mildred v. Neill*, 355; *Ewings v. Ennalls*, 356.

On petition in a creditor's suit dower assigned to a widow who was not a party.—*Watkins v. Worthington*, 512.

On a bill to sell the realty to save the personality, the widow may have her dower of the realty, but not a distributive share of the personality so saved.—*Waring v. Waring*, 676.

ELECTION.

Where a testator may put his devisees to an election to take under or in opposition to his will; in such cases the court may elect for infants.—*Addison v. Bowie*, 622.

EMINENT DOMAIN.

The power of condemnation not in its nature a continuing one, unless so declared.—*Binney's case*, 128, 136.

The grant of such a power to be construed strictly, 129.

The power of eminent domain, on just grounds, may be exercised over all property, 135.

EVIDENCE.

Settlements made by the Orphans Court are not conclusive; but when relied on by a guardian, he should exhibit all the accounts on which it is founded.—*Crapster v. Griffith*, 11.

Depositions taken under a commission issued by the consent of a part of the defendants, cannot be read against the others.—*Kipp v. Hanna*, 30.

Testimony may be taken under an order before a justice of the peace.—*Townshend v. Duncan*, 45; *Andrews v. Scotton*, 631; *Cockey v. Chapman*, 83; *Union v. McComas*, 85.

The probate of a will of real estate considered as *prima facie* evidence.—*Townshend v. Duncan*, 45.

The average amount, or medium time assumed, where the proof is indefinite or various.—*Contee v. Dawson*, 298; *Parker v. Mackall*, 66, 67; *Norwood v. Norwood*, 432.

The truth being in some cases more clearly evidenced through the eye by a diagram, such drawings may be resorted to as evidence or illustration of facts.—*Binney's case*, 114.

Presumptions in regard to surplus water, issuing from a canal, for mills, 138.

No evidence can be introduced to explain the meaning of an act of the legislature; but the words therein used may be explained as by a dictionary, &c., 150, 154.

Any correct evidence may be resorted to for the purpose of shewing what is the common law, 152.

The mode of collecting testimony and taking depositions.—*Winder v. Dissenferrier*, 184.

No objection, coming from a party, to suspend the taking of depositions; but such objections to be noted and decided at the hearing, 192.

A witness may, for cause, demur; upon which his examination must be suspended, 194.

A witness may be compelled to attend, and have his deposition taken before a justice of the peace, 196.

The books of a bank, shewn to contain pertinent evidence, must be produced, 195.

A party may, as of course, withdraw any document which he himself has voluntarily put upon file for the purpose of having it authenticated.—*Maccubbin v. Matthews*, 251.

A witness may be summoned and compelled to give evidence before commissioners, 252.

A commission to take evidence should be executed within a reasonable distance of the residence of the witness, 253.

It is proper to go as far as may be safe, in giving credit to authentications coming from other parts of this Union.—*Contee v. Dawson*, 283.

A party cannot avail himself of proof in regard to any matter not alleged, 285.

A witness or party, ordered to testify or to account, may be summoned and compelled to give evidence before the auditor.—*Hammond v. Hammond*, 310.

A person absent, and not heard from for seven years, may be presumed to be dead.—*Tilly v. Tilly*, 444.

Where it becomes necessary to have the plaintiff's *prochein ami* examined as a witness, he may be discharged, and another appointed in his place.—*Helms v. Franciscus*, 550.

It is the duty of the court to have all its proceedings and proofs translated into the English language, 551.

A petition for the production of books and papers, to be used on a trial at law, must give a sufficient description of them.—*Duvall v. The Farmers' Bank*, 686.

EXECUTORS AND ADMINISTRATORS.

A decree against an executor out of assets, for a part, for the residue, out of his own goods, and for costs, out of his own goods.—*Cheseldine v. Gordon*, 82.

An absolute judgment against an executor or administrator is conclusive of a sufficiency of assets to pay that debt, and also a debt for which he may retain; which conclusion must necessarily enure to the benefit of the heir or devisee.—*Ellicott v. Welch*, 243.

An executor must expressly aver an insufficiency of assets, otherwise he cannot prove and avail himself of the fact.—*Contee v. Dawson*, 286.

The property of a debtor may be detained in this state for the benefit of creditors residing here, or of the state in opposition to a foreign administration, or to the bankrupt or insolvent laws of another country.—*Corrie's case*, 489.

The succession to personal property, on intestacy, is regulated by the law of the deceased owner's last domicil, 489.

FERRY.

One tenant in common, cannot set up another ferry to the prejudice of his co-tenant.—*Norwood v. Norwood*, 476, 483.

Tenants in common, of a ferry, decreed to account, 477.

The specific performance of an agree-

ment to share the profits of a ferry, decreed, 483, 485.

FRAUD.

A voluntary conveyance deemed fraudulent as against creditors, where the grantor could not, at the time, have withdrawn the amount from his estate without hazard to his creditors.—*Kipp v. Hanna*, 33.

None but those who were creditors, at the time, can sue to have a voluntary conveyance set aside as fraudulent; but when it has been vacated, all others may come in, 33.

The holders of property under a fraudulent conveyance held accountable for its rents and profits, 35.

A member of the general assembly censured for fraudulently attempting to obtain a title from the land office for land, after the claimant had petitioned the legislature to pass an act to confirm his title.—*O'Neill's case*, 151.

No positive rule or law can be suffered to be made the instrument of fraud.—*The Rail Road v. Hoyer*, 261.

GUARDIAN.

A female infant of full age at eighteen, to receive her estate, and to release her guardian; but not for any other purpose.—*Crapster v. Griffith*, 7; *Corrie's case*, 489; *Waring v. Waring*, 674; *Woodward v. Chapman*, 72.

A guardian held accountable for the profits of his ward's real estate, notwithstanding the valuation thereof by appraisers.—*Cox v. Cullahan*, 51.

A guardian allowed for maintenance, &c., and charged with interest from the time his ward attained full age, 52.

The deceased guardian's personal estate having been exhausted, his real estate declared to be assets, and liable for the amount found due to the ward, 52.

A guardian made to account for rents and profits lost by his act and neglect.—*Parker v. Mackall*, 64.

A guardian decreed to return a certain amount to his ward, who had attained full age, in *white servants, cattle, plate, and gold tea-spoons*, in kind, without interest.—*Woodward v. Chapman*, 71.

Money awarded to a female infant above sixteen, (eighteen,) directed to be paid into her own hands, 72.

A bill against several, to account for the rents and profits of the plaintiff's estate, held by them as guardians during the plaintiff's infancy.—*Cheseldine v. Gordon*, 79.

The nature, power and duties of a guardian *ad litem*.—*Hammond v. Hammond*, 350.

An infant bound by his answer, by a guardian *ad litem*, in a creditor's suit, 352.

A testamentary guardian removed on account of her negligent and immoral conduct.—*Pratt v. Pratt*, 429.

In all cases where the jurisdiction of the ordinary tribunals falls short, the Chancellor may appoint a guardian, and provide for an infant, on petition, without suit.—*Corrie's case*, 489; *Waring v. Waring*, 674.

An appointment of a guardian to an infant resident here, is recognized every where out of this state.—*Corrie's case*, 489.

HABEAS CORPUS.

The Chancellor, judges and courts can do little more, under a *habeas corpus*, than to relieve from restraint, but the Chancellor has a larger power in regard to infants.—*Jones v. Stockett*, 428; *Corrie's case*, 492; *Helms v. Francis*, 563.

HUSBAND AND WIFE.

A feme covert may be compelled to answer without her husband.—*Kipp v. Hanna*, 28, 30.

A marriage originally valid between then living parties, can only be annulled by the general assembly.—*Campbell's case*, 235.

All personal things being under the husband, it is enough that he alone has been made a party to shew that he has obtained satisfaction of the *chose in action* of his wife.—*Contee v. Dawson*, 282.

A legacy given to a woman for life, remainder to her children, should not be paid to her husband.—*Jones v. Stockett*, 412.

The right to personal property, as a consequence of marriage, is regulated by the domicile of husband and wife.—*Corrie's case*, 489.

The disability of a *feme covert* regarded with kind attention.—*Watkins v. Worthington*, 520.

A husband who can derive no pecuniary benefit from a decree to account, must nevertheless be permitted to attend, and to except for the protection of his rights.—*Helms v. Francis*, 559.

Although husband and wife cannot, by consent, dissolve the marriage contract, yet they may agree to live separate, 561.

In general, the father has a right to the custody of his infant children, yet pulling infants will not be taken from the care of the mother, 563.

A writ of *supplicavit* may be granted for the protection of the wife.—*Bread's case*, 562.

How the wife may contract and dispose of her separate property, 563.

An agreement for a separate maintenance and pin-money, the difference, 564.

Alimony, its nature, and the cases in

which it may be allowed, 565.—*Macnamara's case*, 566; *Lynthecumb's case*, 568; *Scott's case*, 568; *Govane's case*, 570.

Separate maintenance out of the wife's property; in what cases allowed.—*Helms v. Franciscus*, 574.

The allowance and settlement called the wife's equity, 575.

On the ground of the wife's equity only a part is settled, but under circumstances, the whole may be settled; and all the children of the wife, including her bastards, may have the benefit of it, 578, 582.

A husband is bound to maintain his wife and infant children.—*Addison v. Bowie*, 619, 626.

INFANTS.

A female infant of full age to receive her estate at eighteen, and to release her guardian, but not for other purposes.—*Crapster v. Griffith*, 7; *Corrie's case*, 489; *Waring v. Waring*, 673.

Money decreed to a female infant who had attained sixteen (eighteen) years of age, directed to be paid into her own hands.—*Woodward v. Chapman*, 72.

The bill amended, stating that an infant defendant had attained his full age, so that he might be compelled to answer. *Kipp v. Hanna*, 29.

A decree against infants for the payment of money.—*Townshend v. Duncan*, 45.

Where an infant takes as devisee, it is not necessary to allege in the bill, that he received the rents and profits; because it is the duty of his guardian to take care of his estate, 45; *Parker v. Mackall*, 64.

By consent, a certain sum paid by the defendants to the infant plaintiffs for their maintenance, pending the suit.—*Woodward v. Chapman*, 69.

Several infants may join in a bill calling their guardian to account, 68.

The parol does not demur in a creditor's suit by reason of the infancy of a defendant.—*Campbell's case*, 224; *Hammond v. Hammond*, 330, 344, 351.

The nature, power and duties of a guardian *ad litem*.—*Hammond v. Hammond*, 350.

The admission of an infant in his answer, sufficient to found a decree in a creditor's suit.—*Campbell's case*, 220; *Hammond v. Hammond*, 352; *Chamberlain v. Brown*, 221.

On a bill to foreclose the answer of an infant by his guardian *ad litem*, deemed sufficient to found a decree under the act of 1785, ch. 72.—*Lansdale v. Clark*, 358.

In what cases, and how far the court will interfere with the relations of parent and child.—*Jones v. Stockett*, 412, 429; *Helms v. Franciscus*, 563.

A testamentary guardian removed, on the ground of her negligence and immoral conduct.—*Pratt v. Pratt*, 429.

An infant may be brought before the Chancellor to have a guardian *ad litem*, appointed.—*Tilly v. Tilly*, 438.

Land devised to infants for their maintenance, until they attain full age, sold on the petition of some of them, by *prochien ami*, and the appearance of the others by their guardian.—*Tilly v. Tilly*, 437.

Such a peculiarly constituted suit, does not abate by the death of any one of the infants, 439.

Land devised in trust for the maintenance of infants, the trustee must be the person of the profits, 442.

The profits of land devised for the maintenance of infants, must be applied equally among them, and in greater proportions, as some die or attain full age, 442.

And where such an interest has been sold, the proceeds of sale must be applied in like manner, 443.

The jurisdiction of the Chancellor as to infants and lunatics.—*Corrie's case*, 492.

In all cases where the jurisdiction of the ordinary tribunals, falls short, the Chancellor may appoint a guardian, and provide for an infant by petition, without suit, 489.

An appointment of a guardian to an infant resident here, recognized every where out of the state, 489.

The interests of infant defendants may be protected, without prejudice to the rights of others.—*Watkins v. Worthington*, 518.

How an infant may become a ward of court.—*Helms v. Franciscus*, 577.

A father, so far as he is able, is bound to maintain his infant children, and is therefore accountable for the profits of their estate, held by him.—*Addison v. Bowie*, 619.

In general, the father has a right to the custody of his infant children; yet, piling infants will not be taken from the care of their mother.—*Helms v. Franciscus*, 563.

On a bill to sell the realty, to save the personality, the court may appoint a guardian to a female between eighteen and twenty-one years of age.—*Waring v. Waring*, 674.

INJUNCTION.

Injunction to stay proceedings at law on petition, bill afterwards filed stating the case at large.—*Cockey v. Chapman*, 83.

Goods levied upon, to be retained by the sheriff till the hearing. The injunction then made perpetual, and the goods ordered to be restored, 83.

Where it appears to be material that the plaintiff should get an answer from one of the defendants, the injunction continued until his answer comes in.—*Onion v. McComas*, 83; *Binney's case*, 109.

It is better, in most cases, to decide on the motion to dissolve the injunction before an attachment for a breach of it is disposed of.—*Binney's case*, 102.

The court frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining, has led to the state of things that occasions the application, 104.

To obtain an injunction, it is sufficient that the question be important and doubtful, 113.

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The making of a substantial amendment dissolves the injunction of course, unless expressly saved, 103, 107.

The only mode now in use, of obtaining an injunction, is by bill, 104.

The want of jurisdiction, or of proper parties, may be shewn as a cause for dissolving the injunction, 104.

An injunction not granted, unless expressly prayed for, 106.—*Brannock v. Moll*, 106.

The bill must describe the mill-site to which the plaintiff has a right, in order to have it protected by injunction.—*Binney's case*, 117.

The acts alleged in the bill, must be such as to injure the mill-site, and for which the plaintiff has no other remedy, in order to lay a foundation for an injunction, 118, 121.

After the court has, by a decree, in a creditor's suit, assumed the administration of the assets, it will, by injunction, stay all other proceedings.—*Hammond v. Hammond*, 360, 362.

An injunction granted to a mortgagee to stay waste, before the mortgage debt became due.—*Murdock's case*, 461.

An injunction to stay waste, pending an action at law to try the right, 469.

The object of an injunction before answer, is to preserve things in their then condition, not to restore; except consequentially, 469.—*Norwood v. Norwood*, 473.

The mode of obtaining and proceeding upon an attachment for a breach of an injunction.—*Murdock's case*, 486.

Pragmatic trespassers pending an injunction, may be made to remove erections made by them on the property in controversy, 487.

A citizen may take his chance, by a first *ex parte* application, of obtaining an injunction from each one of the courts

having jurisdiction of his case.—*Brown v. Wallace*, 602.

INTEREST.

No interest allowed on an amount found due to an infant in servants, &c. which were to be returned in kind.—*Woodward v. Chapman*, 72.

The mode of allowing and adjusting interest on a distribution in a creditor's suit.—*Hammond v. Hammond*, 366, 372, 384; *Pattison v. Frazier*, 376.

The amount, as adjusted by the auditor, constituted of principal and interest, to bear interest thenceforward until paid. *Hammond v. Hammond*, 371; *Brown v. Wallace*, 591; *Sloss v. McIlvane*, 73; *Onion v. McComas*, 86; *Craig v. Baker*, 239; *Tyson v. Hollingsworth*, 333; *Norwood v. Norwood*, 482, 485.

The mode of computing interest and the cases in which compound interest are allowed.—*Winder v. Diffenderffer*, 204, 205.

Interest not allowed to a British creditor during the revolutionary war. *Chamberlain v. Brown*, 221; *Christie v. Hammond*, 645.

Interest collected by the trustee who made the sale, to be divided among those entitled to the principal.—*Ex parte Conway*, 324.

Interest ceases when the money is brought into court.—*Tyson v. Hollingsworth*, 335.

The conversion of interest into principal by a judgment or decree, not compound interest.—*Hammond v. Hammond*, 370, 380.—*Atkinson v. Hall*, 372; *Pattison v. Frazier*, 377; *Brown v. Wallace*, 591.

Interest of only five per cent. allowed to English creditors.—*Anderson v. Anderson*, 387.

A purchaser under a decree pays interest whether he gets possession or not.—*Brown v. Wallace*, 594.

JURISDICTION.

This court has jurisdiction to decree an account of an annual sum charged upon land.—*Townshend v. Duncan*, 45.

Jurisdiction and powers of the Court of Chancery.—*Binney's case*, 145.

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The exclusive or concurrent jurisdiction of the courts of this state, in relation to the rights and property of a corporation created by this and other states, 148, 149.

The Court of Chancery cannot revise or reverse any judgment of a court of common law.—*Ellicott v. Welch*, 247.

No direction in a will or mere agreement to refer a case to arbitration can oust

- the courts of their jurisdiction.—*Contee v. Dawson*, 275.
- The jurisdiction of the Chancellor as to infants and lunatics.—*Corrie's case*, 492.
- The state is bound to take care of its own citizens, particularly infants, lunatics, and paupers, 492.
- It is not within the scope of judicial power to alter or impair the obligation of contracts.—*Watkins v. Worthington*, 535.
- Courts of equity, having concurrent jurisdiction, should not be brought in collision; how such collisions may be avoided.—*Brown v. Wallace*, 601.
- One court cannot take money from the agent or officer of another, 605.

LAND.

- All common warrants must be lodged with the principal surveyor, and entered in the manner prescribed, otherwise surveys made under them will be deemed void as against others regularly made.—*The Rail Road v. Hoyer*, 259.
- When there is a material difference between the location in the surveyor's book and the actual survey, the latter is taken as a virtual abandonment of the former, 263.
- In caveat cases, where there is a reasonable doubt, patents are allowed so as thereby, in effect, to give the benefit of an appeal, 263.
- Land is governed by the law of the country in which it is situated.—*Corrie's case*, 489.
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- There may be cases where the bringing of a suit by a legatee is prohibited with a bequest over, that the bringing of a suit will be a forfeiture.—*Contee v. Dawson*, 278, 280.
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- A contingent legacy ordered to be brought in and invested, to await the contingency, 293.
- Where a sum is directed to be invested, and the proceeds of the investment is given to one for life with remainder over, the interest which accrued before the investment treated as a part of the principal, 297.
- In general a pecuniary legacy bears interest from the end of one year from the death.—*Hammond v. Hammond*, 315.
- Where one legacy is substituted for another, the substituted legacy has the incidents of the original, 315.

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- A legacy given to a woman for life, remainder to her children, should not be paid to her husband.—*Jones v. Stockett*, 412.
- A legacy of a particular sum, to be put out on interest for the benefit of one for life-remainder over, the legatee for life to be heard as to the investment; the court taking care of the interest of those in remainder, 423.
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- That which is not well and effectually disposed of, goes to the residuary legatee, 560.
- A legacy to a creditor may in some cases be presumed to have been given merely in satisfaction of the debt.—*Addison v. Bowie*, 625.

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- The holder of a vendor's lien, merely as such, cannot sustain a creditor's suit.—*Ellicott v. Welch*, 245.
- The surety of the vendor who pays the purchase money, may have the benefit of the vendor's lien.—*Meluy v. Cooper*, 199.

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- The mode of obtaining a writ *de lunatico inquirendo*.—*Boarman's case*, 89; *Campbell's case*, 217.
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- On the death of the lunatic the court can only deliver itself of its charge, without deciding on the claims of creditors or next of kin, 89.
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MARSHALLING ASSETS AND SECURITIES.

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Assets may be marshalled for the benefit of heirs and next of kin, without prejudice to creditors.—*Waring v. Waring*, 675.

MARRIAGE.

A marriage originally valid between then living parties can only be annulled by the general assembly.—*Campbell's case*, 235.

The contract of marriage, if valid when made, is, with few exceptions, valid every where.—*Corrie's case*, 489.

The binding and peculiar nature of the contract of marriage.—*Helms v. Franciscus*, 561.

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The nature and foundation of an order to bring money into court.—*Contee v. Dawson*, 266.

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A defendant will not be ordered to pay money found due on a decree to account to a trustee, but to bring it into court.—*Tyson v. Hollingsworth*, 332.

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On a bill to foreclose the answer of an infant by his guardian *ad litem* admitting the facts deemed sufficient for a decree.—*Lansdale v. Clarke*, 358.

A decree of foreclosure, unless payment of the aggregate of principal and interest, with interest thereon by a specified day.—*Atkinson v. Hall*, 372.

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Under a *fieri facias* at law against the mortgagor, the purchaser at the sheriff's sale of the equity of redemption for less than the mortgage debt, takes it as incumbered with the residue thereof.—*Worthington v. Lee*, 681.

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A partition of personal estate can be ordered only by a Court of Chancery; and if necessary, a sale may be ordered.—*Crapster v. Griffith*, 25.

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A trustee who had held the estate ordered to account for its rents and profits, 179.

Real estate devised to be sold and the proceeds divided, on petition *ex parte*, a trustee appointed for that purpose.—*Ex parte Boone*, 321.

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A devise of the rents and profits of land for the maintenance of several infants, not susceptible of partition.—*Tilly v. Tilly*, 438.

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No one is a party to the suit against whom no process is prayed.—*Binney's case*, 106.

A misnomer may be waived, but if relied on it is fatal, 107.

Where the legal capacities of parties as charged are different, such capacities must be considered as if they were different persons, 108.—*Tilly v. Tilly*, 445.

A corporation can only be called on to answer by its proper name.—*Binney's case*, 106.

A creditor's suit making the heir at common law a party, with a publication against the other heirs.—*Kilty v. Brown*, 223.

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It is sufficient that the husband alone be made a party, to shew that he has obtained satisfaction of the *chose in action* of his wife.—*Contee v. Dawson*, 281.

Who may or must be made parties to a creditor's suit.—*Hammond v. Hammond*, 347, 349.

The creditors of the ancestor of a deceased debtor may come in under a creditor's suit, without making the executor or administrator of such deceased ancestor parties.—*Hindman v. Clayton*, 341.

Where the debt is joint and several, all the debtors must be made parties.—*Watkins v. Worthington*, 522.

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All questions as to parties must be finally adjusted before there can be a decree to account.—*Helms v. Franciscus*, 559.

All persons having an interest in the object of the suit should be made parties.—*Worthington v. Lee*, 680.

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An answer as to the same facts over-rides the plea.—*The Bank v. Dugan*, 257.

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No one is a defendant to the suit against whom no process is prayed.—*Binney's case*, 106.

A misnomer may be waived, but if relied on is fatal, 107.

The hearing cannot be postponed to let in a release to make a witness competent, or to remove any objection to a witness of which the party was notified at the examination.—*Winder v. Dufferin*, 192.

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The parol does not demur in a creditor's suit by reason of the infancy of a defendant.—*Campbell's case*, 224; *Hammond v. Hammond*, 330, 344, 351; *Watkins v. Worthington*, 519.

Several suits, the objects of which are the same, may be consolidated.—*Campbell's case*, 241; *Deakins' case*, 398.

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A party may, as of course, withdraw any document which he himself has voluntarily put upon file, for the purpose of having it authenticated.—*Maccubbin v. Matthews*, 251.

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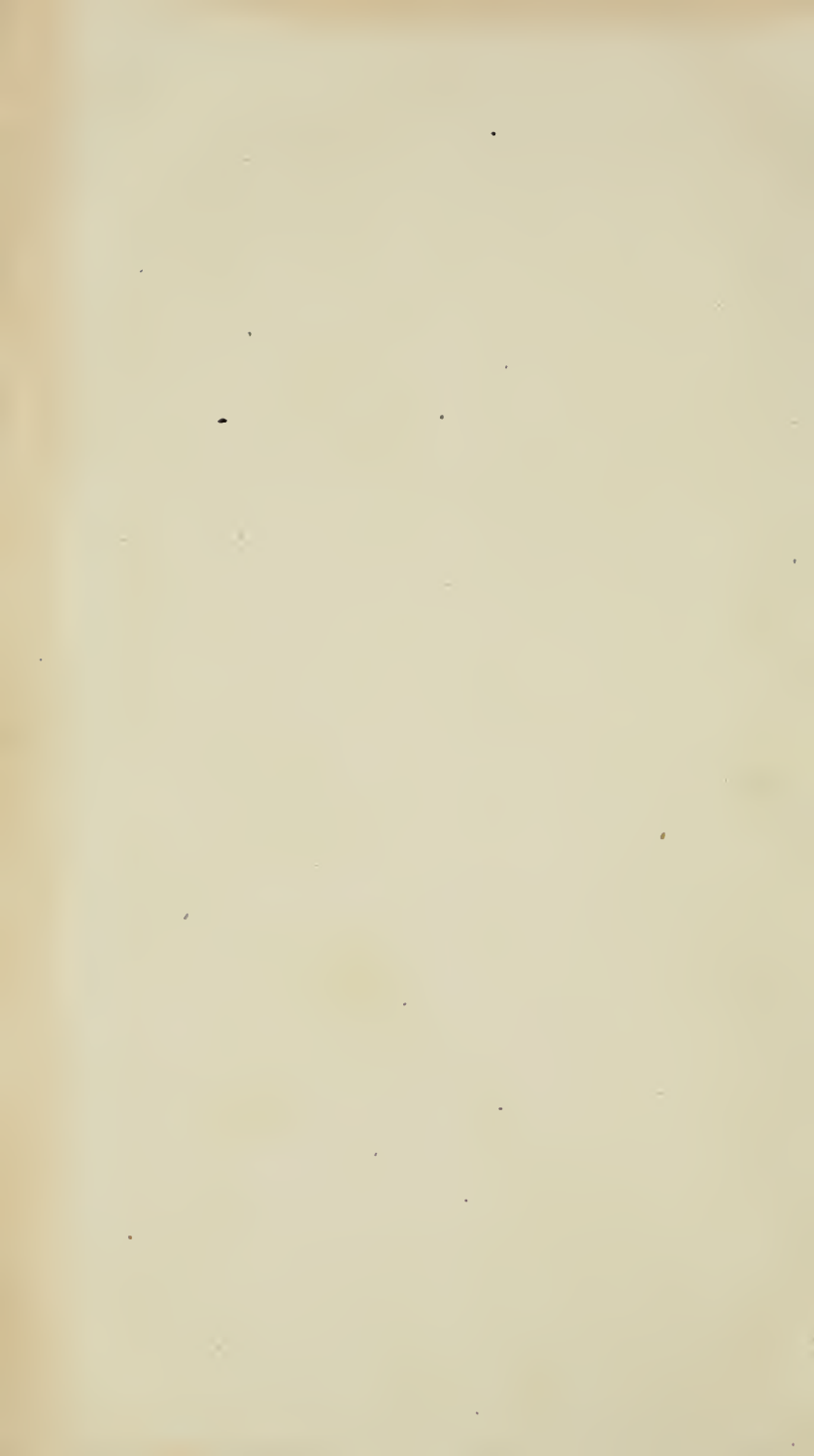
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